

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

---

PAUL D. CEGLIA

Plaintiff,

-vs-

10-CV-569A

MARK E. ZUCKERBERG,  
FACEBOOK, INC.,

Defendants.

---

Proceedings held before the  
Honorable Leslie G. Foschio,  
U.S. Courthouse, 2 Niagara Street,  
Buffalo, New York on April 4, 2012.

APPEARANCES:

DEAN BOLAND, ESQ.,  
SANFORD DUMAIN, ESQ.,  
ROBERT CALIHAN, ESQ.,  
PETER SKIVINGTON, ESQ.,  
STEVEN TEPPLER, ESQ.,  
Appearing for Plaintiff.

ORIN SNYDER, ESQ.,  
ALEX SOUTHWELL, ESQ.,  
AMANDA AYCOCK, ESQ.,  
TERRANCE FLYNN, ESQ.,  
THOMAS DUPREE, ESQ.,  
MATTHEW BENJAMIN, ESQ.,  
Appearing for Defendants.

AUDIO RECORDER: Sandra Wilson

TRANSCRIBER: Michelle L. McLaughlin, RPR,  
Official Reporter,  
U.S.D.C. W.D.N.Y.  
716/332-3560

(Proceedings recorded by electronic sound  
recording, transcript produced by computer.)

1           THE CLERK: On the record, Ceglia versus  
2           Zuckerberg and Facebook. Appearing for the  
3           plaintiff are Dean Boland, Sanford Dumain.

4           MR. DUMAIN: Good afternoon, your Honor.

5           THE CLERK: Robert Calihan, Peter  
6           Skivington and Steven Teppler.

7           Appearing for the defendants are Orin Snyder.

8           THE COURT: Excuse me. Mr. Skivington,  
9           why are you seated in the back area?

10          MR. SKIVINGTON: I've come to sit with the  
11          parents. If that's all right with the Court, I'll  
12          be happy to sit up there.

13          THE COURT: Oh, with the parents. The  
14          parents of --

15          MR. BOLAND: My client's parents, your  
16          Honor, Mr. and Mrs. Ceglia.

17          THE COURT: Why would he need to be seated  
18          with the parents if he's counsel of record?

19          MR. BOLAND: Well, I didn't have any role  
20          in that.

21          THE COURT: If you're going to -- we're  
22          hoping that you'd participate since you're a new  
23          counsel, and so we want you front and center.

24          MR. SKIVINGTON: Thank you, your Honor.

25          THE COURT: Maybe there's an extra chair

1       you can pull up to counsel's table instead of  
2       sitting -- I didn't realize that there weren't  
3       going to be enough chairs. Pull up a chair, make  
4       yourself comfortable. There's another one back  
5       there if somebody needs another one.

6               We've had the pleasure of I think -- I think  
7       we've had the pleasure of Mr. and Mrs. Ceglia's  
8       company in the past, so I don't know that they need  
9       counsel to comfort them here during the  
10      proceedings.

11             Okay. Who was the last one Mr. McEvoy, Sandra?

12               THE CLERK: No, Mr. McEvoy is just a  
13      litigation support from the law firm of Milberg.  
14      He might be speaking too.

15               THE COURT: Okay.

16               THE CLERK: Appearing for the defendants  
17      Orin Snyder, Amanda Aycock, Terrence Flynn, Alex  
18      Southwell and Thomas Dupree and Matthew Benjamin.

19               We're here on a Rule 16(b) hearing and also a  
20      hearing on defendants' motion to stay discovery.

21               THE COURT: It's your motion, Mr. Snyder.

22               MR. SNYDER: Thank you, your Honor. Good  
23      afternoon.

24               THE COURT: Good afternoon. Use the  
25      podium. I'm assuming you would like to stand and

1 deliver as you usually do.

2 MR. SNYDER: Thank you, your Honor. I  
3 appreciate it. Your Honor, last June, more than  
4 nine months ago, I stood before this court in the  
5 old courtroom I think on Court Street, and at that  
6 time the defendants asked your Honor to order  
7 targeted expedited discovery based on a fraction of  
8 the evidence before the Court today, but enough  
9 evidence to provide a substantial basis for  
10 demonstrating that the Work for Hire document  
11 attached to the complaint is a forgery, that the  
12 purported emails quoted in the amended complaint  
13 are fabrications, and on that basis your Honor,  
14 over Ceglia's opposition, ordered targeted  
15 discovery.

16 And at that time I told your Honor exactly what  
17 we envisioned. That expedited discovery that was  
18 narrowly targeted to confirm the inauthenticity of  
19 the Work for Hire document would yield further  
20 corroborating, confirmatory evidence of the fraud.  
21 I told your Honor that our experts, upon  
22 examination of the original document and  
23 Mr. Ceglia's computers and electronic media would  
24 conclusively prove that this plaintiff is  
25 perpetrating a fraud on the Court. I told your

1 Honor at that time that we would file a motion to  
2 dismiss the lawsuit pursuant to the inherent power  
3 doctrine, which, of course, empowers this Court to  
4 exercise a critical gatekeeping function that  
5 protects courts, juries, and our judicial system  
6 from becoming in the words of the United States  
7 Supreme Court, quote, "mute and helpless victims of  
8 deception and fraud."

9 Your Honor granted that motion ordering  
10 targeted expedited discovery designed to test the  
11 authenticity of the Work for Hire document, the  
12 so-called emails, all of which Mr. Ceglia had  
13 access to, continued to have access to for the past  
14 nine months and have access to prior to the  
15 commencement of this fraudulent lawsuit.

16 Now, what happened during the next nine months  
17 was nothing less than extraordinary. First, of  
18 course, the Court ordered discovery. When I say  
19 over the plaintiff's opposition, he wanted  
20 so-called reciprocal discovery, broad discovery,  
21 Mr. Zuckerberg's deposition, access to Facebook's  
22 computers, the whole kit and caboodle. And on a  
23 fraction of the evidence before this Court, your  
24 Honor said no, it needs to be targeted to core  
25 issues of fraud in the case.

1           What happened next your Honor is aware of.  
2           Smoking gun forensic proof, objective proof of the  
3           fraud. First and foremost, we found the authentic  
4           contract on both the plaintiff's hard drive and the  
5           hard drive of the international law firm Sidley and  
6           Austin where it has sat since March of 2004. And  
7           because that's an authentic contract that's existed  
8           in the real world for many, many years, his Work  
9           for Hire document must be necessarily a forgery,  
10          because the one thing the parties agree on is that  
11          there's only one contract that is real. It's  
12          either the Work for Hire document or the StreetFax  
13          contract. To this date --

14                 THE COURT: Just to clarify, on the second  
15          page of the StreetFax contract is -- with the  
16          signatures, I mean, that's part of the StreetFax  
17          contract, correct?

18                 MR. SNYDER: They match up, yes. Yes,  
19          they are.

20                 THE COURT: Well, I mean, that's it.  
21          That's what I was found on the drive.

22                 MR. SNYDER: Yes, your Honor.

23                 THE COURT: There's never been an original  
24          of it discovered so far?

25                 MR. SNYDER: Correct. At the outset of

1 the case we informed the Court that Mr. Zuckerberg  
2 does not have and did not keep since his freshman  
3 year at Harvard many things that he had as a 18- or  
4 19-year-old in college including the original of  
5 the contract. But I did tell your Honor that if we  
6 had access to his computers, and remember he hid  
7 the Seagate computer from this Court. He lied to  
8 this Court when he committed a sworn document, lied  
9 to this Court in sworn statements concealing the  
10 Seagate computer because it had the StreetFax  
11 contract on it.

12 THE COURT: Is that the one that was lost  
13 as well?

14 MR. SNYDER: No, what was --

15 THE COURT: The large hard drive.

16 MR. SNYDER: What was lost, we say  
17 spoliated, were the USB devices containing page 1  
18 and page 2 of StreetFax contract.

19 THE COURT: Yes, but there was a larger --  
20 there was a larger hard drive that was lost too.

21 MR. SNYDER: I don't think so, your Honor.  
22 It was the USB devices that were destroyed.

23 THE COURT: Okay. Just the USB.

24 MR. SNYDER: Or spoliated.

25 THE CLERK: Now, what I'm getting at is

1 the StreetFax document is -- it's not denominated  
2 in any of the papers as a contract. It just said  
3 StreetFax on it, correct?

4 MR. SNYDER: It's a written instrument  
5 signed by both parties.

6 THE COURT: I know that. But we refer to  
7 it as StreetFax contract --

8 MR. SNYDER: I do, because it's an  
9 agreement.

10 THE COURT: Yes, but that's not the  
11 labeling on the document.

12 MR. SNYDER: It Says StreetFax --

13 THE COURT: That's my point.

14 MR. SNYDER: And it is without question,  
15 yes, a legal instrument that is a contract or  
16 agreement. Yes, your Honor.

17 THE COURT: I'm not focusing on that. I'm  
18 just focusing on the actual physical appearance of  
19 the document.

20 MR. SNYDER: Correct, your Honor.

21 THE COURT: And my next question is -- and  
22 why I'm still a little fuzzy on this, I don't know  
23 after reading all these papers -- is it your  
24 contention that the Work for Hire document contract  
25 is a fake both as to the first page and the second



1 page which contains the signatures, or is the  
2 second page actually a copy, mirror copy?

3 MR. SNYDER: It appears to be --

4 THE COURT: M-I-R-R-O-R.

5 MR. SNYDER: Yes. It appears --

6 THE COURT: Of the -- excuse me, StreetFax  
7 contract.

8 MR. SNYDER: Yes. Page 2 appears to be  
9 either an exact duplicate of the authentic real  
10 page 2 of the StreetFax contract or a near perfect  
11 facsimile. But it appears to be a duplicate. Of  
12 course we were not there when Mr. Ceglia and his  
13 cohorts fabricated the document. And, of course,  
14 when we talk about the Work for Hire document, we  
15 now know forensically, objectively, scientifically  
16 that during the course of this lawsuit Mr. Ceglia  
17 created a second version of the Work for Hire  
18 document, which I'll get to in a moment.

19 THE COURT: Which is the one he turned  
20 over, not the one that's attached to the amended  
21 complaint.

22 MR. SNYDER: Yes, and the leading  
23 handwriting expert in the world, who the United  
24 States government hires for their most important  
25 cases, because they don't have someone in-house as

1 good, found 20 points of difference. One is enough  
2 like a fingerprint. He has 20. That, standing  
3 alone, is the most egregious fraud before your  
4 Honor when we were in the well of this court. This  
5 man created a second version of the document he is  
6 suing on.

7 THE COURT: Question is why? Why would he  
8 do that?

9 MR. SNYDER: Because he needed to create  
10 another version to bake. Let me get to that in a  
11 moment, your Honor.

12 THE COURT: He didn't attach the original  
13 to the amended complaint.

14 MR. SNYDER: No, he attached a copy.

15 THE COURT: Correct.

16 MR. SNYDER: But he was test --

17 THE COURT: There is no original.

18 MR. SNYDER: Well, he has the original.  
19 He has presumably two originals.

20 THE COURT: Your argument is that the  
21 document that was turned over for inspection in  
22 July that was baked is the original?

23 MR. SNYDER: Is a different version of the  
24 original that he used to copy what he attached to  
25 the complaint. They're two separate documents.

1 THE COURT: That's exactly my point.

2 MR. SNYDER: Yes.

3 THE COURT: But we've never seen the  
4 original. We don't have the original.

5 MR. SNYDER: The first original we don't  
6 have. The second original we've all examined. Now  
7 what's extraordinary --

8 THE COURT: No, it's a copy.

9 MR. SNYDER: But we all have inspected the  
10 original that Mr. Argentieri produced in July.

11 THE COURT: And you're saying that was  
12 recently fabricated.

13 MR. SNYDER: I'm saying that it has been  
14 scientifically determined that that is a different  
15 document than the document, a copy of which is  
16 attached to the complaint. There's no question  
17 about that. Now, to this day, either Ceglia --

18 THE COURT: Why would he do that?

19 MR. SNYDER: What's that?

20 THE COURT: Why would that be?

21 MR. SNYDER: This is a man who was  
22 manipulating --

23 THE COURT: Why would you take the  
24 original of the copy that's attached to the  
25 complaint and bake it if you were going to bake it,

1       rather than create another instrument and bake it?

2               MR. SNYDER:   If you want me to speculate  
3       about the criminal mind, I can speculate.   For  
4       example, he wanted to obviously he baked or  
5       subjected the document he gave us to light  
6       treatment to bake it and create an aged appearance,  
7       and he had the first fabricated document that  
8       Mr. Argentieri had in the safe deposit box that he  
9       gave a copy of to his experts, and he wanted to  
10      test the baking on a new original document.   Before  
11      we know, there's a third and fourth and fifth and  
12      sixth and seventh sitting in a drawer somewhere.

13              THE COURT:   Well, according to Stroz  
14      Friedberg, there were test forgeries --

15              MR. SNYDER:   Correct.

16              THE COURT:   -- floating around that  
17      suddenly got discovered as well.

18              MR. SNYDER:   Correct.   To this day either  
19      Mr. Ceglia or any of his lawyers, including his  
20      newest ones, have been willing to submit a sworn  
21      declaration, much less anything certified under  
22      Rule 11, and we've sent them all Rule 11 letters,  
23      your Honor, denying the authenticity of the  
24      StreetFax contract.   Incredibly, your Honor, if you  
25      read the 17-page opposition brief cataloging a

1 laundry list of supposed fact issues, it doesn't  
2 mention -- it doesn't mention much less deny or  
3 dispute the authenticity of the StreetFax contract.

4 All we've heard is one of the newest lawyers  
5 saying to a national newspaper incredibly, not  
6 pursuant to Rule 11, not in this Court making a  
7 representation to your Honor, that Mr. Zuckerberg  
8 planted the StreetFax contract after hacking into  
9 the plaintiff's computer and presumably scanning it  
10 on to his computer and presumably in 2004, who  
11 knows when, emailing it to Sidley Austin. I  
12 challenge any of the lawyers in this courtroom to  
13 make that representation to your Honor that they  
14 have a good-faith basis in law or fact for that  
15 assertion which is preposterous, defamatory, and  
16 false.

17 And let me tell you something, your Honor, you  
18 do not get discovery, you do not get to first base  
19 based on the martians have landed kind of  
20 allegations. It's no different than a bank robber  
21 saying it wasn't me on the photo. It wasn't my  
22 fingerprints. The martians invaded my body, and it  
23 was the martians. This is as fantastical an  
24 allegation supported by not a shred of evidence.

25 THE COURT: You don't believe in cyber

1 fairies?

2 MR. SNYDER: I don't I believe in cyber  
3 fairies or little blue monsters in 2004 not only  
4 scanning on to Mr. Ceglia's computer the StreetFax  
5 contract, but then emailing a Mr. Kole, where  
6 there's no evidence they even knew who Mr. Kole  
7 was.

8 THE COURT: Mr. Lake made this assertion  
9 originally, didn't he?

10 MR. SNYDER: Mr. Lake did. But  
11 Mr. Lake --

12 THE COURT: In court in the old  
13 courthouse.

14 MR. SNYDER: He did. And we will remember  
15 that statement in court that he made.

16 THE COURT: I'm just pointing out that  
17 it's not the first time we've heard it, and it was  
18 on the record.

19 MR. SNYDER: No. And the reason, your  
20 Honor, we didn't make this motion in September, as  
21 your Honor is aware which we devoutly wanted to do  
22 --

23 THE COURT: The point is that Mr. Lake's  
24 assertion was never followed up on by the  
25 plaintiff.

1 MR. SNYDER: Never followed up by the  
2 plaintiff, and more over there is not a shred of  
3 evidence to support that speculation. It would be  
4 like saying if the murder weapon was found in the  
5 defendant's possession, accusing, without any  
6 basis, some other party of planting the evidence,  
7 without a shred of support, and the law does not  
8 allow parties to make irresponsible allegations.

9 Now, of course, the critical point here, maybe  
10 the Milberg firm knows this, maybe they don't.  
11 When he concealed the Seagate hard drive for the  
12 purpose of defrauding this Court and my client,  
13 meaning not telling us the truth that this contract  
14 existed, which irresponsibly was not in the DLA  
15 complaint either. Of course DLA is out of the  
16 case. What did Mr. Ceglia swear to this Court and  
17 Mr. Argentieri, who's not here either today. I  
18 don't know where he is.

19 THE COURT: Where is Mr. Argentieri,  
20 Mr. Boland?

21 MR. BOLAND: Your Honor, he wasn't able to  
22 make the trip. He's out in California at the time  
23 being.

24 THE COURT: He didn't know that we had  
25 this scheduled for some time?

1 MR. BOLAND: Oh, no. He's fully aware.  
2 He's getting all the ECF notifications as well.

3 THE COURT: I see.

4 MR. SNYDER: So --

5 THE COURT: What is he doing in  
6 California?

7 MR. BOLAND: I'm not sure what the  
8 conflict was, your Honor. I can find out and have  
9 him communicate to you.

10 THE COURT: In a case of this magnitude he  
11 had a conflict he couldn't resolve in favor of  
12 being here?

13 MR. BOLAND: I don't know if it was  
14 personal or not, I'm not sure.

15 THE COURT: He certainly hasn't notified  
16 the Court about his unavailability, has he, Sandra?

17 THE CLERK: No, Judge.

18 MR. BOLAND: We have several other able  
19 counsel here to assist me, your Honor, so I think  
20 that nothing -- it won't hold the Court back.

21 THE COURT: Well, I wasn't suggesting  
22 otherwise. I was just suddenly surprised to  
23 realize he wasn't here.

24 MR. BOLAND: I assure you, your Honor, we  
25 won't hold anything back by the fact that he's not



1 here. We'll keep it moving forward for you.

2 THE COURT: I don't think that's the  
3 point, Mr. Boland.

4 MR. BOLAND: Very well.

5 THE COURT: Go ahead.

6 MR. SNYDER: Of course, your Honor, the  
7 question is whether able counsel appearing before  
8 this Court noticing appearances in this matter are  
9 aware that Mr. Ceglia, when he was caught  
10 red-handed with the Seagate hard drive with the  
11 contract that no one disclosed on this side to the  
12 court, but we new existed. We told your Honor day  
13 one Mark Zuckerberg signed a StreetFax contract.  
14 We didn't know we were going find it on his  
15 computer. We thought we might, and he tried to  
16 hide it from the Court. And what did he say when  
17 he was caught? He said I sent that email to James  
18 Kole. He was my lawyer.

19 Your Honor, it is privilege and confidential,  
20 do not show it to the other side. Did he say that  
21 anyone planted it? No, he didn't. So he was  
22 either lying to your Honor at that time under oath  
23 committing perjury, or today his lawyers to the  
24 Wall Street Journal, maybe to this court, are  
25 misrepresenting the facts or asserting facts

1 without a shred of evidence which directly  
2 contradicts their client's sworn testimony to your  
3 Honor that this was a communication that he sent to  
4 his lawyer. It can't be both.

5 Now we're here, your Honor, nine months later,  
6 and it is the height of cynicism that these lawyers  
7 accuse us of delay. We have spent 20 hours with  
8 your Honor. And we appreciate your Honor's time  
9 and thoughtfulness on five motions to compel. We  
10 wanted to move to dismiss in September. We  
11 couldn't because at every turn this plaintiff and  
12 his lawyers obstructed the court-ordered discovery  
13 in acts of defiance and obstruction that in and of  
14 themselves, not only constitute independent grounds  
15 for dismissal, but in our judgment are paradigmatic  
16 grounds for Rule 37 dismissal of this case. That's  
17 the -- I don't know if it's Roman two or Roman  
18 three of our motion to dismiss. Five separate  
19 motions requiring hundreds of pages of briefing  
20 consuming more than 15 hours of hearings,  
21 Mr. Benjamin points out, all of which we believe  
22 parenthetically the plaintiffs and the law firms  
23 that have represented him are responsible under  
24 Rule 11.

25 Incidentally, Mr. Ceglia hasn't paid the

1       \$75,000 in fees that this Court awarded more than  
2       six weeks ago. But we're here, your Honor,  
3       because -- nine months later, because it took us  
4       five trips to make this plaintiff compliant, and he  
5       still hasn't complied.

6             Let me tell your Honor something that we  
7       haven't spelled out --

8             THE COURT: Hasn't complied with?

9             MR. SNYDER: Yet he's still in defiance of  
10       your Honor's orders.

11            THE COURT: I thought we cleared up those  
12       problems with the supplemental declarations. I was  
13       going to ask you about that.

14            MR. SNYDER: No, your Honor.

15            THE COURT: Go ahead. Go ahead.

16            MR. SNYDER: I'm not sure if the Milberg  
17       firm is aware of this either. On April 2011, this  
18       plaintiff created an email account  
19       getzuch@gmail.com, referring to Mark Zuckerberg.  
20       Get zuch. He failed to disclose that to your Honor  
21       in his sworn declaration on August 29th, 2011. He  
22       lied to this Court, one of multiple lies.

23            THE COURT: But didn't he file some  
24       supplemental declarations pursuant to my recent  
25       D and O that granted your motion in both respects?

1 MR. SNYDER: Yes, but let me tell, your  
2 Honor, what happened in the interim.

3 THE COURT: Okay.

4 MR. SNYDER: On January 28th, 2012, before  
5 Stroz Friedberg found this account, he deleted all  
6 of its content. Deleted it, everything in the  
7 account during the pendency of this lawsuit,  
8 getzuch@gmail.com. It was only after Stroz  
9 Friedberg identified it, and then he played games  
10 with us and failed to get us the forms for a long  
11 time with more -- more dog-ate-my-homework kind of  
12 excuses that we got it, and like the Seagate  
13 computer and everything else he withheld, and the  
14 reason we were so dogged for five motions to compel  
15 is we knew that every time this criminal plaintiff  
16 was hiding evidence, it was because there was more  
17 under the rock to find, and that's what happened  
18 with the get zuch email. And it's what happened --

19 THE COURT: Did you discuss that deletion  
20 in your spoliation argument?

21 MR. SNYDER: It's in the Stroz Friedberg  
22 report, your Honor.

23 THE COURT: Oh.

24 MR. SNYDER: Now, of course -- so the  
25 spoliation, which I'm not going to go through and

1 document, is an independent grounds for -- for  
2 dismissal, and certainly a stay. And I've  
3 litigated, your Honor, the question of spoliation,  
4 many times under the Zubulake. In fact, Mr. Dupree  
5 and I were just in the Appellate Division in New  
6 York on that issue. And to say that this is a  
7 clear case for spoliation dismissal is an  
8 understatement. It is difficult to imagine a  
9 series of facts here, not only authorizing the  
10 Court to dismiss based on the litigation misconduct  
11 here, all of which is cataloged in our papers.

12 But making this a case not only would the  
13 Second Circuit summarily affirm dismissal here, but  
14 it would be a fact pattern that would be so  
15 egregious that I --

16 THE COURT: You know it's dangerous to  
17 predict how appellate courts will rule.

18 MR. SNYDER: Well, this one --

19 THE COURT: Or any court for that matter.

20 MR. SNYDER: You know, your Honor, this is  
21 the equivalent of the confession, the videotape,  
22 the eyewitness, the fingerprints, and the DNA, and  
23 then some more evidence that I can't think of.  
24 It's difficult to imagine -- if someone presented  
25 this fact pattern in law school, the students would

1 think it was make believe. No one could be this  
2 abusive of the judicial system, lawyers, and  
3 litigant, because, of course, the lawyers who  
4 withdrew from the case previously told your Honor  
5 that their client, Mr. Ceglia, instructed them to  
6 obstruct your Honor's orders, and then withdrew  
7 from the case, promptly causing the sanction.

8 Now, your Honor, we're here today -- that's the  
9 background. And we're here today of course --

10 THE COURT: The Milberg is a distinguished  
11 firm of course.

12 MR. SNYDER: I don't know -- I don't know  
13 whether they're a distinguished firm.

14 THE COURT: You don't know the firm at  
15 all?

16 MR. SNYDER: I know the firm well.

17 THE COURT: Well --

18 MR. SNYDER: I know they are a law firm.

19 THE COURT: -- how could you know them if  
20 they weren't distinguished? You only deal with  
21 distinguished law firms, right?

22 MR. SNYDER: I would prefer not to  
23 comment.

24 THE COURT: Okay. In any event, the point  
25 is their position is that their client's entitled

1 to his day in court.

2 MR. SNYDER: Yes. They're wrong --  
3 they're entitled to his day in court. They've had  
4 their day in court for nine months. They're going  
5 to have their day in court today. They have an  
6 opportunity to oppose our motion to dismiss, and  
7 they have had access to all the evidence that is  
8 necessary to review before we did.

9 Your Honor's expedited discovery order simply  
10 put us on equal footing where the plaintiff was  
11 before he filed this lawsuit. But I'll address  
12 that in a moment, your Honor.

13 I just want to make this point.

14 THE COURT: Before -- well, we don't know,  
15 because we never I think have discussed it with  
16 Mr. Boland directly, or for that matter Mr. Lake  
17 when he was in the case, as to what extent the  
18 plaintiff's own crew of experts have delved into  
19 the issues more profoundly than your experts have.  
20 We don't even know, or do we?

21 MR. SNYDER: Well, let me --

22 THE COURT: We'll find out.

23 MR. SNYDER: I do know, and if they  
24 didn't, they've had years to do it presumably. But  
25 beyond that, I do know and can represent to this

1 Court that the DLA Piper law firm, before filing  
2 the amended complaint, knew or should have known  
3 about all of the evidence -- let me withdraw. Knew  
4 or should have known of a substantial amount of the  
5 evidence that we present in our motion to dismiss,  
6 and failed to present that to the Court in the  
7 complaint. And presumably the Milberg firm knows  
8 that as well. That's for a different day, your  
9 Honor.

10 The point is we know that their team of experts  
11 examined the document that Mr. Argentieri pulled  
12 out of his envelope in July. We know that their  
13 experts say January of 2011, we're reviewing the  
14 computers, and everything -- everything else.

15 So we're here today, your Honor, because the  
16 Court expedited discovery, served its precise  
17 intended purpose. This is a case study, your  
18 Honor, and will be for years I think for litigants  
19 across the country for when expedited discovery is  
20 necessary and appropriate. Because what it did is  
21 it produced the additional evidence, forensic  
22 evidence of the fraud.

23 But for today the Court need not decide our  
24 motion to dismiss in order to grant a stay. In  
25 order to stay we call plenary discovery which is



1 the abusive, wide-ranging fishing expedition that  
2 they want to subject my clients to in the face of  
3 this fraud to extract the settlement that all their  
4 documents make clear is their design here. In  
5 order to stay plenary discovery and defer entry of  
6 a scheduling order, the Court need only conclude  
7 that our motion to dismiss hand substantial  
8 grounds.

9 If we had substantial grounds in 2011 when your  
10 Honor ordered expedited discovery, we have  
11 substantial grounds times ten today. This is not a  
12 close question. Rule 26 --

13 THE COURT: I don't think I found that. I  
14 think that --

15 MR. SNYDER: Good cause.

16 THE COURT: Whatever, colorful basis,  
17 something like that.

18 MR. SNYDER: I think it was good cause.

19 THE COURT: Sure.

20 MR. SNYDER: Rule 26 gives this Court  
21 broad discretion.

22 THE COURT: Perhaps a little less than  
23 substantial basis, or do you think they're the  
24 same?

25 MR. SNYDER: You know, your Honor, the

1 test is stated as substantial grounds or -- it's in  
2 the disjunctive -- does not appear to be without  
3 foundation in law. So I think --

4 THE COURT: Pretty forbearant standard.

5 MR. SNYDER: I think it's a flexible  
6 standard that gives the Court the broad discretion  
7 as the fact finder that is appropriate. And so  
8 your Honor has the broadest of discretion here  
9 that -- that turns on a balancing of well known  
10 factors that your Honor in the Steuben Foods  
11 case -- it's actually a leading case in the  
12 circuit.

13 THE COURT: Steuben.

14 MR. SNYDER: Steuben.

15 THE COURT: As in Steuben glass.

16 MR. SNYDER: Yes.

17 THE COURT: After the Baron. That's  
18 why -- that's why my courtroom is named after  
19 Wyoming county.

20 MR. SNYDER: I'm from Manhattan, your  
21 Honor.

22 THE COURT: I know, that's why I'm trying  
23 to educate you.

24 MR. SNYDER: Named after --

25 THE COURT: We were in the Big Apple

1       recently, my wife and I, for a wonderful vacation  
2       trip.

3               MR. SNYDER:   Named after the Mannahatta  
4       Indian, Native Americans.

5               THE COURT:   By the way, if I sound a  
6       little horse, it's because my son and I attended a  
7       certain hockey game last night.

8               MR. SNYDER:   Yes.

9               THE COURT:   And on to the Rangers.

10              MR. SNYDER:   So the balancing of the  
11       factors, you know, whether dispositive motion is  
12       pending --

13              THE COURT:   Excuse me, Philadelphia.

14              MR. SNYDER:   Yes.   Whether a dispositive  
15       motion is pending, of course, it is, and if so, its  
16       strength.   Here we say not only do we have  
17       substantial grounds and foundation in law, but a  
18       motion to dismiss that is powerful, and --

19              THE COURT:   Could I ask you a question  
20       about the -- one of the expert's points.   This is  
21       rather technical.   The specification referred to by  
22       Professor Tytell, the six-page specification, I was  
23       intrigued by his analysis of the signature on the  
24       signature line which co-dates -- or is of the same  
25       date as the purported Work for Hire instrument.

1 And pointing out that the ink seems to be  
2 substantially different. And I'm just wondering  
3 why you didn't allude to that in your analysis.  
4 It's not discussed in either Mr. Southwell's  
5 excellent executive summary, nor in your brief.

6 MR. SNYDER: Miss Aycock tells me because  
7 it is purportedly confidential, meaning the  
8 plaintiff, for some reason --

9 THE COURT: Well, the substance is, but  
10 not the point of the signatures.

11 MR. SNYDER: For some reason the  
12 plaintiff -- my team tells me we were --

13 THE COURT: Overcautious.

14 MR. SNYDER: We were overcautious because  
15 of what we thought was inappropriate  
16 confidentiality designation --

17 THE COURT: Yeah, but you already alluded  
18 to it in his report, which was published to me,  
19 wasn't it, or were those redacted out?

20 MR. SNYDER: All redacted.

21 THE COURT: Oh, okay.

22 MR. SNYDER: That's the only reason.

23 THE COURT: Okay.

24 MR. SNYDER: So, your Honor. The second  
25 factor is the extensiveness of the discovery sought

1 and the burden of the discovery. And the third, of  
2 course, is the prejudice.

3 So, in terms of the grounds, we have four  
4 separate independent grounds for dismissal,  
5 inherent power, dismissal for fraud on the Court,  
6 and let me just address the question of fact  
7 finding.

8 Of course, your Honor is required to find facts  
9 in determining whether under its inherent power  
10 dismissal is warranted. That's the very point. It  
11 doesn't transform this into a Rule 56 motion. The  
12 function of the Court as the gatekeeper to protect  
13 this great judicial system of ours is to find facts  
14 to determine whether we and your Honor and the  
15 public are victims of fraud. And so if you look,  
16 for example, at the Shangold case, which is --

17 THE COURT: I'm familiar with those cases.  
18 You don't have to go through them. The question I  
19 had under my query regarding Federal Rule of  
20 Evidence 1008 subdivision A was this, and that is I  
21 didn't see any cases cited where the issue was  
22 related to -- I didn't see any cases in your  
23 discussion of the inherent power where the court  
24 was confronted with -- where any court discussed  
25 whether or not that rule of evidence pertains,

1       regardless of whether or not the contract at issue  
2       was a purportedly a fraud.

3               MR. SNYDER: I think that -- perhaps  
4       because although it was -- it was a provocative  
5       question that your Honor posed, it is apples and  
6       oranges, because Rule 1008 is a component, of  
7       course, of the best evidence rule, which is a trial  
8       evidence rule, and necessarily we believe does not  
9       apply in the context of motion to dismiss, which is  
10      why no court has ever interpreted the rule to limit  
11      a court's inherent power. If it did limit the  
12      court's power to dismiss a lawsuit as a fraud, then  
13      the inherent power doctrine would be substantially  
14      circumscribed, and it is why in the context, for  
15      example, of motions for sanctions the courts across  
16      the country have held that playing that important  
17      function of gatekeeper policing conduct before the  
18      Court, the Court is not restricted by the Federal  
19      Rules of Evidence.

20              THE COURT: Just, I note -- I read  
21      carefully Judge Wholes hobbles -- I'm  
22      pronouncing -- interesting decision in the DAG  
23      Jewish Directories case you cited.

24              MR. SNYDER: Yes.

25              THE COURT: And that, of course, was a

1 contract that was at issue.

2 MR. SNYDER: Yes.

3 THE COURT: And he found it to be  
4 fraudulent and threw the case out.

5 MR. SNYDER: Yes.

6 THE COURT: But the rule of evidence issue  
7 didn't arise, that's my point.

8 MR. SNYDER: Right. I think it didn't  
9 arise because it was in a pretrial setting, and  
10 under the courts inherent powers, so it was  
11 inapplicable.

12 THE COURT: So you don't see that rule  
13 as -- as Congress's statement that whenever there's  
14 an allegation of fraudulent contract, it's a  
15 question for the jury?

16 MR. SNYDER: I think that --

17 THE COURT: Vel non.

18 MR. SNYDER: I think that that's an  
19 impossible reading of the rule in light of the  
20 Second Circuit and Supreme Court's precedent  
21 authorizing, empowering, and commanding trial  
22 courts in the federal court system to police fraud  
23 and dismiss cases based on fraud, which in many  
24 context, requires fact finding, and in some  
25 instances fact finding --

1 THE COURT: Directed to a purported  
2 contract.

3 MR. SNYDER: Fact finding concerning a  
4 purported contract. And, of course, it is a -- one  
5 of the -- it is not an uncommon modus operandi of  
6 litigation fraud. I mean, there are different  
7 species of litigation fraud, bribing witnesses,  
8 fabricating documents.

9 THE COURT: Yes.

10 MR. SNYDER: And fabricating contracts  
11 certainly is a popular one. Now, your Honor -- so,  
12 on the first element, plaintiff fails miserably to  
13 show that a stay is not warranted. Firstly, they  
14 blatantly -- and maybe it was a typo, I don't know.  
15 I don't know who wrote the brief. Maybe  
16 Mr. Argentieri is writing the briefs in California.  
17 I don't know. But they blatantly misstate the  
18 legal standard in a signed pleading that they filed  
19 in opposition to our motion. They say that -- that  
20 the dispositive motion must be, quote, certain to  
21 prevail. Well, that is an untrue statement of the  
22 law, as this Court well knows.

23 THE COURT: Where do they say that?

24 MR. SNYDER: They do. Document 345.  
25 (indiscernible).



1 THE COURT: Where is that in your papers?

2 MR. SNYDER: On page 10.

3 THE COURT: Is that the quotation?

4 MR. SNYDER: They cite -- interesting they  
5 cite a -- no, your Honor. They mischaracterize the  
6 Eastern District of California case, Eastern  
7 district of California case. First of all, they  
8 miss -- first of all, they cite a case out of the  
9 district, even though they knew or should have  
10 known that the Second Circuit binding, controlling  
11 Second Circuit and Southern District -- and Western  
12 District authority, and then failing to cite  
13 relevant cases, they then distort the  
14 out-of-jurisdiction case they cite, and I have not  
15 studied Ninth Circuit law recently on this point.  
16 For all I know it's different. I haven't studied  
17 it. I don't think it's important whether it is or  
18 isn't different, because the Second Circuit's  
19 rule --

20 THE COURT: I see your point. They then  
21 go on to pair -- not paraphrase but echo the  
22 quotation in the Eastern District of California  
23 case saying there is no certainty that defendant's  
24 motion would prevail. I understand. And  
25 therefore -- and yet the discovery will be futile.

1 I understand thank you. I missed that.

2 MR. SNYDER: They tell your Honor the law  
3 is -- which is extraordinary since your Honor wrote  
4 one of the leading decisions in this circuit on  
5 this point.

6 THE COURT: Really? Did I?

7 MR. SNYDER: I mean, people cite it.

8 THE COURT: I had no idea it was leading.

9 MR. SNYDER: It's cited.

10 THE CLERK: Thank you.

11 MR. SNYDER: What I mean, your Honor, is  
12 they tell your Honor --

13 THE COURT: Flattery will get you  
14 absolutely no place.

15 MR. SNYDER: I understand, but I can't  
16 help it.

17 THE COURT: I know.

18 MR. SNYDER: They tell your Honor that it  
19 must be certain that the motions will prevail.  
20 That is a false statement of the controlling law.  
21 There's no other way to say it. So -- so we've met  
22 that standard with respect to the evidence of  
23 plaintiff's fraud last summer, when we sought  
24 expedited discovery, and since then, because of the  
25 overwhelming evidence we've uncovered, obviously

1       our case for dismissal is even stronger, so  
2       awarding the plaintiff the plenary discovery now  
3       that your Honor determined he was not entitled to  
4       in July would make no sense and would reward this  
5       plaintiff who comes to the court with the  
6       uncleanest of hands and with an unpaid sanction and  
7       worse for his disobedience.

8               So the first factor we think is 99-to-1 in our  
9       favor. The burden on defendants is obvious. Now,  
10      Mr. -- the first moment I was in court in this case  
11      in front of Judge Arcara on the frivolous motion to  
12      remand, that was where -- that was the first series  
13      of lies they told after filing the complaint, which  
14      is that somehow Mr. Zuckerberg, they said, was an  
15      itinerant traveler who was living out of a  
16      backpack, which, of course, was all make believe.  
17      But the first -- I can tell your Honor the first  
18      time I saw Mr. Argentieri and his counsel, and he  
19      said oh, we should talk, we're going to get  
20      Mr. Zuckerberg's deposition. Get zuch. He has an  
21      email account to that effect. That's been their  
22      goal from day one to subject Facebook and my  
23      clients to e-discovery. They brought some vendor  
24      from the Milberg firm who is presumably going to  
25      tell your Honor that how they should scrounge

1 through all of Facebook's computers since 2003.  
2 That's what they want.

3 Committing a criminal fraud in this court,  
4 spoliating evidence, lying to your Honor  
5 repeatedly, they want to conduct discovery of  
6 Facebook's computer dating back to 2003, make  
7 forensic images of all the computers, search every  
8 one of the thousands of computers and documents,  
9 and there's absolutely no valid basis for this  
10 abuse of discovery, which ironically is broader  
11 even than what the lawyer -- I can't remember which  
12 one -- said to your Honor they wanted when they  
13 were opposing our request for expedited discovery.

14 THE COURT: Mr. Lake.

15 MR. SNYDER: Mr. Lake, right. So the  
16 purpose of all this is laid out in their litigation  
17 overview document, which was Mr. Argentieri and  
18 Mr. Homburg, whoever he is, extortion document  
19 which was the one that they used to try to sell a  
20 piece of this lawsuit to a law firm. And that  
21 document makes clear that the sole purpose from day  
22 one was to jack up Facebook, harass Facebook into a  
23 settlement, which Mr. Ceglia told the press, quote,  
24 "You won't go public, Mark. You won't IPO, you  
25 won't past go. I won't let you sell this company

1 out from under me, not while I have the power to  
2 stop you." It's difficult to imagine when you put  
3 the litigation overview document together with that  
4 statement, a more clear expression of the true  
5 motive behind this fraudulent lawsuit, which is the  
6 second factor, to harass and abuse the defendants  
7 through the discovery process using a criminal  
8 fraud, as present litigation, as the mechanism to  
9 try to extract the settlement that they want, but  
10 will never, ever get.

11 Now, the third factor is prejudice. In the  
12 good cause -- in the determination of whether a  
13 stay is appropriate. These newest lawyers and  
14 Mr. Ceglia have not identified any cognizable  
15 prejudice that would result from a stay of plenary  
16 discovery pending a ruling on defendant's  
17 dispositive motions because, of course, we have the  
18 motion for judgment on the pleadings as well.

19 So, instead what he says is we're really moving  
20 for summary judgment, and on summary judgment  
21 cases, we're entitled to all sorts of discovery,  
22 and the Court can't find facts. I've addressed all  
23 of that. The point here is a simple one. A party  
24 perpetuating a fraud does not have the right --

25 THE COURT: You don't think they're

1 entitled to some discovery directed to when the  
2 statute of limitations accrued and the possibility  
3 of equitable estoppel based on Welling?

4 MR. SNYDER: No. I think that under  
5 Rule 12 if your Honor believes that there are facts  
6 outside the pleading that are necessary to resolve  
7 that motion -- we believe there are none, the  
8 proper -- your Honor has two choices. Your Honor  
9 can deny the motion and say it's premature. Your  
10 Honor can convert the motion to a Rule 56 motion,  
11 in which case we would say, if your Honor were  
12 inclined to do that, put that motion in abeyance,  
13 because the fraud here is the threshold issue and  
14 there's no need even to waste time on that, if your  
15 Honor --

16 THE COURT: Put statute of limitations and  
17 laches aside?

18 MR. SNYDER: We believe it is ripe,  
19 because there are facts in the public record, facts  
20 of which this Court could take judicial notice that  
21 make this case woefully time barred, and make the  
22 application of laches as a matter of law clear.  
23 But back to the question of the third factor, the  
24 prejudice. A party perpetrating a litigation fraud  
25 forfeits the right to engage in plenary discovery.

1 That's the whole purpose of the inherent power  
2 doctrine to short circuit the fraud before the  
3 system, the victim defendant, and the public are  
4 abused through the course of litigation, because  
5 the goal the fraudulent lawsuits often is to  
6 subject defendants to cost, expense, and burden of  
7 discovery to provoke a settlement.

8 So, it's our view, your Honor, that this  
9 plaintiff has had access to the very original  
10 document and electronic copies that we have  
11 examined, and our experts have determined,  
12 corroborate and constitute ironclad proof of fraud.  
13 They've had those materials for years, all of his  
14 so-called emails, all of his computers, his floppy  
15 disks, his CDs, his hard drives, his web mail  
16 accounts. Indeed he had access to materials that  
17 no longer exist, because he destroyed them. So he  
18 had greater access than we or the Court.

19 THE COURT: When did you say he -- I must  
20 have -- I tried to read all of Stroz Friedburg's  
21 report. I didn't read line-by-line all of the  
22 others. I didn't have time. But just -- is there  
23 a reference in there wherein they say that they  
24 found that it was deleted. I think that's the Get  
25 Zuch account was deleted.

1 MR. SNYDER: The Get Zuch account was --  
2 all the content in that email account was deleted  
3 on February 28th, 2012.

4 THE COURT: 2012?

5 MR. SNYDER: January 28th, 2012. Stroz  
6 Friedberg identified it on February 1, 2012, lo and  
7 behold.

8 THE COURT: I'm confused how. Stroz  
9 Friedberg received the account, they had access to  
10 the account on what date?

11 MR. SNYDER: What happened was --  
12 February 1st is when he they found it. They found  
13 a remnant of it, or they found some forensic  
14 reference to it.

15 THE COURT: He identified it before,  
16 didn't he?

17 MR. SNYDER: No. He lied to this Court  
18 when he submitted his supplemental affidavit on  
19 August 29.

20 THE COURT: But he -- but he then gave us  
21 a --

22 MR. SNYDER: Well, when Stroz Friedberg  
23 said we found it, once again he said oh, yeah, I  
24 forgot about it. Forgot about it? He just -- he  
25 just wiped out all the contents.



1 THE COURT: When did that supplemental  
2 declaration get filed where he did acknowledge it?

3 MR. SOUTHWELL: Your Honor, it was in --

4 THE COURT: This is Mr. Southwell speaking  
5 for the record.

6 MR. SOUTHWELL: Thank you, your Honor. It  
7 was after Stroz Friedberg identified references to  
8 the Get Zuch account in his other email accounts.  
9 That information was disclosed. At that point  
10 Mr. Boland offered to make -- to provide the  
11 consents, and we provided the consents to gmail.  
12 We went back and forth. We had a fifth motion to  
13 compel, and we very recently got the information  
14 from that account, which is what revealed that back  
15 in January that there is no content from earlier  
16 than January of 2012, i.e. the deletion.

17 MR. SNYDER: As he submitted a declaration  
18 now to (indiscernible) account yet?

19 MR. SOUTHWELL: Now he has put in the  
20 supplemental declaration I think that your Honor is  
21 referring to --

22 THE COURT: Yes.

23 MR. SOUTHWELL: -- which does, in fact,  
24 I'd now after --

25 THE COURT: What was the date of that

1 supplemental declaration, anybody --

2 (Indiscernible cross-talk)

3 THE COURT: One at a time.

4 MR. BOLAND: I'm sorry, your Honor,  
5 there's actually two of those. He offered a  
6 declaration which just identified the newly  
7 discovered accounts which he had not used, so he  
8 had forgotten them. And in an abundance of  
9 caution --

10 THE COURT: What was the date of that?

11 MR. BOLAND: I'll have to look -- I'll  
12 look and find it, your Honor, and then he  
13 submitted --

14 THE COURT: I'm trying to understand  
15 whether he gave the declaration before or after he  
16 emptied out the account.

17 MR. SNYDER: After. After, your Honor,  
18 for sure. So when Mr. Boland says to your Honor,  
19 again he didn't -- he didn't say that under oath.  
20 Maybe he will certify that he's saying it under  
21 Rule 11 that he hasn't used it, that's a lie.  
22 Because all of the content was deleted by the  
23 plaintiff on January 28th, 2012. It's difficult to  
24 imagine a more relevant use by a litigant than  
25 deleting an email account during the course of this

1 litigation entitled Get Zuch, meaning get my  
2 client. Presumably damage, harm, victimize my  
3 client, which is what he is doing here.

4 THE COURT: So, that's why I'm focusing on  
5 it. So you're saying that if the declaration  
6 post-dates the deletion, the declaration is false?

7 MR. SNYDER: The declaration --

8 THE COURT: Do I have it correctly?

9 MR. SNYDER: The declaration is not  
10 only --

11 THE COURT: No. No. I'm really concerned  
12 about this sequence, since you raise it. And seems  
13 to me to be a very simple question. Why can't I  
14 get a straightforward answer?

15 MR. SNYDER: The declaration, your Honor,  
16 was dated by -- dated February 22, 2012.

17 THE COURT: You're going too fast. Slow  
18 down.

19 MR. SNYDER: So let me give the whole  
20 chronology carefully and slowly.

21 THE COURT: Please.

22 MR. SNYDER: In April of 2011 --

23 THE COURT: Yes.

24 MR. SNYDER: -- unbeknownst to us during  
25 the course of this litigation, the plaintiff

1 created an account entitled getzuch@gmail.com. As  
2 a result of various acts of misconduct your Honor  
3 granted our motion and required Mr. Ceglia to  
4 supplement his prior sworn declaration.

5 On August 29, 2011, he submitted a new  
6 declaration purportedly curing the previous  
7 declaration, which was false and incomplete. He  
8 did not disclose in his August 2011 declaration the  
9 existence of the account he had created several  
10 months earlier.

11 THE COURT: Get Zuch.

12 MR. SNYDER: Yes.

13 THE COURT: I got that.

14 MR. SNYDER: On February 1st, 2012, Stroz  
15 Friedberg, during its forensic examination,  
16 identified four new web mail accounts --

17 THE COURT: Excuse me, February --

18 MR. SNYDER: 1st, 2012, Stroz Friedberg  
19 identified four new web mails accounts --

20 THE COURT: Yes.

21 MR. SNYDER: -- about which we were  
22 unaware because Mr. Ceglia in his various sworn  
23 statements failed to disclose them. We then sought  
24 a motion to compel to get access to those accounts.  
25 And after wrangling --

1 THE COURT: And get a complete declaration  
2 including them.

3 MR. SNYDER: And after wrangling, all  
4 sorts of false starts, and snide, snarky emails,  
5 which I can show your Honor at some point --

6 THE COURT: I read them all. I granted  
7 your motion.

8 MR. SNYDER: We finally -- I got access to  
9 the account --

10 THE COURT: Yes.

11 MR. SNYDER: -- after much expense and  
12 burden --

13 THE COURT: Yes.

14 MR. SNYDER: -- and found that on  
15 January 28th, 2012, contrary to Mr. Boland's  
16 representation to your Honor moments ago, this  
17 plaintiff deleted all of the content of that  
18 email -- of that email account. It's gone.  
19 Forever. He spoliated --

20 THE COURT: When did he supplement --

21 MR. SNYDER: And then finally --

22 THE COURT: Yes.

23 MR. SNYDER: -- on February 29 -- 22, 21  
24 days after Stroz Friedberg first identified it, but  
25 after we disclosed to Mr. Boland our findings, and

1 almost a month after Mr. Ceglia knew that he had  
2 sanitized, deleted the account, he submitted a  
3 sworn declaration to your Honor swearing pursuant  
4 to the penalty of perjury that he was -- "I was  
5 recently made aware of additional email accounts  
6 accessed from our computer analyzed by defendants'  
7 electronic discovery firm. At the time of  
8 completing any prior declaration, I did not recall  
9 the existence of any of these email accounts,  
10 otherwise they would have been disclosed in these  
11 declarations per the Court's orders. These email  
12 accounts were not concealed by anyone by their  
13 omission from prior declarations". And he goes on,  
14 "immediately being informed of the existence, I  
15 completed consent forms and give them to my  
16 lawyer." And then with respect to the Get Zuch, he  
17 does not address it -- oh, he does say "It's my  
18 understanding that signed consent forms for the  
19 accounts, which include the Get Zuch account, were  
20 provided to defendants' counsel immediately after  
21 receipt by my lawyer." Then he says, cherry on the  
22 top, "I do not have any recollection at this time  
23 of any additional email accounts I may have created  
24 and/or used, other than those already disclosed to  
25 defendants."

1           Now this was an another perjurious submission  
2           because he is telling your Honor falsely that he  
3           didn't recall the existence, and they weren't  
4           concealed from anyone, when, in fact, he created  
5           the account in April of 2011 and failed to disclose  
6           them to your Honor in August of 2011. And if it  
7           happened to have slipped his mind that he created a  
8           Get Zuch account, he should have remembered it in  
9           February 2012, because on January 28th, 2012, he  
10          took the active unlawful step of deleting its  
11          contents.

12          So we now have all of that content missing, as  
13          well as the USB device with page 1 and page 2.tiff  
14          of the very contract on which he's suing which he  
15          also withheld and concealed from the court. We  
16          respectfully submit that those two acts of defiance  
17          alone constitute grounds for summary dismissal of  
18          the case immediately without any further review of  
19          any evidence. And without making any predictions,  
20          the notion that the Second Circuit United States  
21          Court of Appeals wouldn't summarily affirm that and  
22          refer it for consideration by all sorts of  
23          different tribunals is -- is -- is -- let me just  
24          say that it's difficult to imagine more defiant act  
25          of relevant, prejudicial case-ending spoliation

1       than those two. He's suing on a contract, page 1  
2       and page 2 of which were on a tiff file that we  
3       found -- we found the original authentic contract  
4       on a tiff file that he concealed. It's on a USB  
5       device that he spoliates. That was his first  
6       efforts to hide the authentic StreetFax contract.

7           He didn't think we would find his Seagate hard  
8       drive, so he spoliates the USB device with tiff  
9       page 1, page 2. He hides the Seagate, so then when  
10      we found the Seagate, he had a problem. So because  
11      the act of spoliation now has relevance and  
12      conduct. We understand why he destroyed the USB  
13      device.

14           And then the Get Zuch, of course, we'll never  
15      know what he used that account for you because that  
16      electronic data is lost, lost forever. So --

17           THE COURT: No way that it can be  
18      reconstructed?

19           MR. SNYDER: Our request, your Honor, is  
20      that the Court stay discovery, defer setting a  
21      discovery schedule until this Court has ruled on  
22      defendants' dispositive motions, and I'm happy to  
23      answer any other questions and certainly respond to  
24      anything --

25           THE COURT: You're willing to allow them



1 to conduct some limited discovery of their experts  
2 -- or your experts?

3 MR. SNYDER: It's our position, your  
4 Honor, that no discovery is necessary or  
5 appropriate. What we said in our reply brief is  
6 that if your Honor is inclined to permit some  
7 discovery, and I know your Honor made comments to  
8 that affect that your Honor was thinking that might  
9 be something to consider at a prior hearing, it  
10 should be limited solely and narrowly tailored  
11 consistent with the case law to the relevant  
12 forensic issues raised in -- in defendants' motion  
13 dismiss, which would be some discovery directed our  
14 experts, and if they have their own experts --

15 THE COURT: Do you agree? I don't think  
16 you do, but I just want to make sure I have it  
17 straight, do you agree that there conceivably could  
18 be any reason for a deposition of any of your  
19 experts on any grounds?

20 MR. SNYDER: I could see that there would  
21 be -- I don't think it's at all necessary, meaning  
22 to say I think this Court is within its sound  
23 discretion to dismiss this case on the record  
24 before it on multiple, multiple grounds without any  
25 additional development of the record. I think that

1 plaintiff has been afforded every process and  
2 privilege that is due given the facts and  
3 circumstances of the fraud, and, frankly, his  
4 egregious litigation conduct here, which I think is  
5 relevant to where this Court is going to open up  
6 this Court's processes any further to this  
7 plaintiff. So it's our position that your Honor  
8 can and should dismiss the case on the record  
9 before it.

10 We made the -- we made the alternative argument  
11 just to let your Honor know that in the event that  
12 the Court was thinking about some kind of  
13 discovery, the most we think that would be at all  
14 even arguably appropriate would be limited to  
15 depositions of our experts, and if they have any  
16 experts who are willing to swear to anything, that  
17 we would depose them. But anything beyond that  
18 would be -- would be inappropriate and --

19 THE COURT: I'm thinking about the cost of  
20 unnecessary delay and although I did allude to a  
21 possible fairness consideration back in December in  
22 regard to expert discovery or expert opinions I  
23 should say, I just -- concerned about the amount of  
24 time that that would be required to be completed,  
25 and then, of course, assumedly -- which we'll find

1 out momentarily from one or more of plaintiff's  
2 attorneys -- to what extent -- whether the --  
3 regardless of the breadth of discovery that may be  
4 permitted, if any, in the event that there is some  
5 thought about taking expert depositions, exactly  
6 what would be the justification for it under these  
7 circumstances?

8 MR. SNYDER: I mean, I think, your Honor,  
9 that that --

10 THE COURT: I mean, I -- at the time we  
11 were discussing it, I had no idea of what exactly  
12 your experts were going to say and how they were  
13 going to say it, but I do now.

14 MR. SNYDER: We think that the request for  
15 any discovery of our experts is for the same  
16 purpose as their -- their request for any  
17 discovery, which is to delay and impose more  
18 burden. I think that, for example, if your Honor  
19 was reviewing the evidence and at any time had any  
20 questions about any of the evidence as -- as the  
21 fact finder and gatekeeper that your Honor -- in  
22 that role, it would be certainly appropriate if  
23 your Honor had any questions while reviewing the  
24 record, which is extensive, there are ways in which  
25 your Honor communicates very effectively with

1 counsel. You did with respect to 1008 and all  
2 sorts of other issues. And if during the course of  
3 your Honor's review of the extensive record, your  
4 Honor had any questions, there are ways that the  
5 parties can address them more efficiently and  
6 targeted, than, you know, 28 days of depositions  
7 where there will be 14 other motions to compel and  
8 false emergencies, and the like, and the discovery  
9 of the StreetFax contract ends this case. The  
10 spoliation ends this case, and, your Honor, doesn't  
11 even need to --

12 THE COURT: The analysis of the --

13 MR. SNYDER: Work for Hire document.

14 THE COURT: Well, I was thinking of the  
15 floppy disks and the alleged copying of the emails  
16 between Mr. Ceglia and Mr. Zuckerberg --

17 MR. SNYDER: Yes.

18 THE COURT: -- which seeming to implicate,  
19 according to your experts, computer system clock  
20 manipulations and back dating, which is really  
21 quite interesting.

22 MR. SNYDER: And I will say that we are  
23 aware that one or more of the law firms involved in  
24 this case before filing pleadings before this Court  
25 had access to all of those electronic media and

1 conducted their own examination and never informed  
2 this Court, because they knew or should have known,  
3 that those computers were -- were riddled and  
4 polluted with the most abusive evidence of  
5 manipulation, and no one on this table is going to  
6 challenge Stroz Friedberg.

7 Indeed, your Honor made reference to the  
8 Milberg firm. I have no awareness of this. I  
9 would imagine the Milberg firm has hired Stroz  
10 Friedberg, and I imagine if this gentleman here was  
11 put under oath, he would tell you that the Stroz  
12 Friedberg firm is the best in class. There is no  
13 close number two to them. The United States  
14 government hires them when they need help. And  
15 they have sworn to your Honor to all of this  
16 evidence, and I would like to -- I challenges any  
17 of these lawyers to tell your Honor why any of that  
18 is wrong.

19 Mr. Dumain tells the Wall Street Journal that  
20 there was a plant and a hack. Does he have a --  
21 does he have any forensic evidence to support that?  
22 What do his experts say to justify discovery?

23 THE COURT: He said that to the Wall  
24 Street Journal?

25 MR. SNYDER: He did.

1 THE COURT: I didn't see that. Well then  
2 I don't keep -- I don't read the Wall Street  
3 Journal.

4 MR. DUMAIN: I'm sorry, your Honor, I did  
5 not say that to the Wall Street Journal.

6 THE COURT: Oh, okay. Thank you. One  
7 last question. I know we're not here for oral  
8 argument on the motion to dismiss, and, of course,  
9 you'll want to perhaps have some rebuttal, and this  
10 is all very important, so I'm completely at your  
11 disposal as far as the amount of time you wish to  
12 take in presenting your positions, but I was  
13 intrigued by this discussion in -- let me see,  
14 Miss Aycock's declaration -- I want to give her  
15 some credit here -- and the Stroz Friedberg report  
16 pages 41 to 43. It wasn't clear to me when the  
17 plaintiff used the hex editor, and I wasn't quite  
18 clear on what the -- I know we're not here for oral  
19 argument on the merits of the motion, but --

20 MR. SNYDER: We would be happy to answer  
21 any questions.

22 THE COURT: Excuse me. It's not clear --  
23 I mean, it does sort of bear on the question of the  
24 stay, which then forces the Court to look to some  
25 degree at the merits and probability of success on

1 the motion to dismiss.

2 MR. SNYDER: Of course.

3 THE COURT: And the notion of a hex editor  
4 was totally new to me and novel, and it had sort of  
5 an oh, what shall we say, a mysterious -- I'll use  
6 that term diplomatically -- ring to it or aura, and  
7 yet I couldn't quite figure out why it was in your  
8 papers. And I realize there's some degree of  
9 speculation involved, but I just thought I'd -- I  
10 would just express candidly a lack of clarity or  
11 understanding as to what your point was about it.  
12 Particularly when was it that -- when was it that  
13 Stroz Friedberg thought that he might have used it.  
14 And were you attempting to imply perhaps that he  
15 did use it somehow to create the Work for Hire  
16 contract or some other documents? I really  
17 couldn't -- I'm trying to understand what the  
18 relevance of it is.

19 MR. SOUTHWELL: Your Honor, I would be  
20 very happy to address --

21 THE COURT: Or maybe a supplemental  
22 briefing, but to the extent that it was intriguing  
23 to me and had a certain, like I say, an aura of  
24 mystery about it -- I suppose to be very candid, it  
25 had more than an aura of mystery. It had an aroma

1 of suspiciousness about it.

2 MR. SOUTHWELL: Agreed, your Honor. It's  
3 a very interesting issue. The Aycock declaration  
4 is actually filed publicly --

5 THE COURT: I mean, as I understand it,  
6 this hex editor allows a person to manipulate data  
7 in a way that's indiscernible to normal forensic  
8 analysis.

9 MR. SOUTHWELL: Indeed, your Honor.

10 THE COURT: What conceivable use could  
11 this plaintiff have made of it in the context of  
12 this case.

13 MR. SOUTHWELL: A very good question, your  
14 Honor.

15 THE COURT: Well, thank you for that.

16 MR. SOUTHWELL: I can't actually respond,  
17 your Honor. Those documents have been designated  
18 as confidential by the plaintiff --

19 THE COURT: Really?

20 MR. SOUTHWELL: -- which is why we did not  
21 disclose --

22 THE COURT: They're in the Aycock  
23 declaration.

24 MR. SOUTHWELL: -- in the public record --

25 THE COURT: Oh, okay.



1           MR. SOUTHWELL: -- the substance of the  
2       Aycock declaration.

3           THE COURT: Well, you're not disclosing  
4       the documents to give me your opinion as to why you  
5       allude to them to the Court. I don't think, do  
6       you?

7           MR. SOUTHWELL: I think it is certainly a  
8       very suspicious --

9           THE COURT: Do you have any objection to  
10      that, Mr. Boland.

11          MR. BOLAND: No, your Honor, none at all.  
12      I'd like to hear what he has to say.

13          THE COURT: You'd be intrigued to know  
14      too, wouldn't you?

15          MR. BOLAND: I'd be intrigued to know.

16          THE COURT: And you don't need it to be  
17      redacted?

18          MR. BOLAND: No. Whatever he has to say,  
19      your Honor, we'll have a response. I'm interested  
20      to hear.

21          THE COURT: Thank you.

22          MR. SOUTHWELL: Your Honor, hex editor  
23      programs are known for manipulating the underlying  
24      code of a document. And there are other documents  
25      in the record and attached to the Aycock

1 declaration which illustrate the use of a hex  
2 editor to apparently manipulate the metadata, the  
3 data underlying the document that shows its  
4 providence, which is all suggestive of an attempt  
5 to create a fraudulent document. And we would  
6 submit, your Honor, that this is directly related  
7 to the supposed Work for Hire document which has  
8 been advanced in this case, and that the -- what he  
9 refers to test forgeries.

10 THE COURT: He wouldn't need to use a hex  
11 editor to finesse that, would he?

12 MR. SOUTHWELL: For the electronic version  
13 of it.

14 THE COURT: There's no indication from  
15 Stroz Friedberg that he did.

16 MR. SOUTHWELL: Actually, yes, your Honor,  
17 for the electronic version.

18 THE COURT: That's what I'm not grasping  
19 here.

20 MR. SOUTHWELL: So there's -- they have  
21 advanced a hard copy version, you know, a purported  
22 original. There was one attached to the complaint.  
23 There was the one presented for inspection in  
24 response to the Court's order which we have put in  
25 evidence is, in fact, different than the one that

1 was attached to the complaint. But we also  
2 expected to find an electronic version of it  
3 because, of course, Mr. Ceglia has said under oath  
4 that he created it on a word processing program and  
5 then printed it. One would expect to find an  
6 electronic version.

7 THE COURT: But there was none.

8 MR. SOUTHWELL: None was found, but what  
9 was found were numerous test forgeries, documents  
10 which were indicative of attempts to create that  
11 electronic version of the document, and then  
12 deleted versions that appeared to be related to  
13 those documents. And there was evidence of a hex  
14 editor being used in relation to that, a program  
15 that can be used to alter or manipulate underlying  
16 data, much like the backdating, your Honor, that  
17 you focused on. When you backdate system clock,  
18 you are changing or trying to change the metadata  
19 behind the documents. Those are all the forensic  
20 artifacts that one looks for to try to ascertain  
21 the authenticity of documents.

22 THE COURT: You're saying that he -- well,  
23 if he's manipulating code -- he doesn't need to  
24 manipulate code. He had a -- which I just, because  
25 we're working on the -- as you know, we reserved

1 decision on the motion to compel the ten documents  
2 asserted to be work -- attorney-client privileged  
3 and work product. We're working on that issue.

4 MR. SNYDER: Yes, your Honor.

5 THE COURT: And something came up there,  
6 and I looked at it and I said geez, I thought he  
7 didn't have -- he claimed he didn't have the  
8 StreetFax contract. Well, as it turned out what I  
9 mistakenly understood to be the StreetFax contract  
10 was actually the StreetFax -- what the heck was it  
11 called, specimen or --

12 MR. SOUTHWELL: Specification?

13 THE COURT: No. Some other word. I'm  
14 stumbling now. Format or template where he used  
15 that document to engage in negotiations to get the  
16 StreetFax project up and running. And without  
17 breaking the confidentiality, there is a document  
18 in Miss Aycock's declaration wherein the StreetFax  
19 format, if that's what it's called or something  
20 else, was used, and there's a signature by somebody  
21 that apparently engaged in some commercial  
22 relationship with the plaintiff relative to the  
23 project.

24 MR. SOUTHWELL: Right.

25 THE COURT: So my point is that if he was

1       able to create that text, which you've agreed as to  
2       the second page is identical to the Work for Hire  
3       document, then you can see what -- as a  
4       nontechnical person who's struggling to understand  
5       all of this high-tech terminology is trying to  
6       grasp, then why would it be necessary to use a hex  
7       editor to create the entirety of the Work for Hire  
8       document?

9               MR. SOUTHWELL: I think, your Honor,  
10       because --

11              THE COURT: Is that a fair question?

12              MR. SOUTHWELL: Yes. And let me try to  
13       respond this way, your Honor. One would expect to  
14       find a electronic version of this Work for Hire  
15       document.

16              THE COURT: You know what I'm talking  
17       about. I'm now referring to the Work for Hire --  
18       or, excuse me, the StreetFax template or whatever  
19       this word is that I can't remember. It's revealed  
20       in the documents that you --

21              MR. SOUTHWELL: Right.

22              THE COURT: -- that you submitted to me.

23              MR. SOUTHWELL: There's the authentic  
24       StreetFax contract, and there are other related  
25       contracts to that authentic StreetFax contract, all

1 of which corroborate the authentic StreetFax  
2 contract.

3 THE COURT: No, no, no. This is a  
4 document -- this is like the original. It's almost  
5 as if what I'm trying to describe to you and if  
6 there's a word in the document you have it in front  
7 of you, you can see it. It's like template or  
8 specification, or something, wherein he created  
9 this document with all his legal verbiage -- sort  
10 of a kitchen table contract by a nonlawyer, always  
11 a dangerous thing obviously, as this case shows  
12 dramatically -- and it was that. That was in his  
13 possession, and it was in his system. So why would  
14 he need a hex editor to create another page of it?

15 MR. SOUTHWELL: Your Honor, because, I  
16 would submit, he was trying to create an electronic  
17 version of his fabricated contract to further his  
18 fraud to show --

19 THE COURT: Why would he need to use a hex  
20 editor to do that? That's what I'm not getting.

21 MR. SOUTHWELL: Because it's supposed to  
22 be from 2003, and he's creating it in 2011. It's  
23 supposed to be from 2003 if it's for real, but it's  
24 really from 2011 when he's creating it. So he  
25 needs to use the hex editor, much like he's

1       backdating --

2               THE COURT: But he knows -- according to  
3       you, he knows how to backdate a computer, the  
4       metadata. What does the hex editor get him?

5               MR. SOUTHWELL: There's more to backdating  
6       then simply backdating the system clock. You use  
7       the hex editor to wash over or cover up some of the  
8       tracks of creating the document recently. So there  
9       are examples that are detailed there of multiple  
10       documents that appear to be test forgeries, ten  
11       different copies of this Work for Hire sort of  
12       template. And there are six documents that appear  
13       to be used to test the effects of modifying a Word  
14       document with a hex editor. And there are files  
15       that you are called text to copy over to test  
16       document, document to paste into. And those were  
17       all saved in folders called work to copy into  
18       beginning folder.

19              THE COURT: Okay. Okay.

20              MR. SOUTHWELL: And all of that was used  
21       for the sole purpose of testing the use of a hex  
22       editor, and as in Stroz Friedberg's experience,  
23       that is how electronic forgers forge their  
24       documents. They need to test it out. It's not  
25       something they can just do.

1           THE COURT: Its only use is for illegal  
2 purposes?

3           MR. SOUTHWELL: No, your Honor. There are  
4 other purposes, but in this context given what was  
5 found by Stroz Friedberg on Mr. Ceglia's machine.

6           THE COURT: When did he use it though?  
7 That's the other thing that was not clear to me in  
8 the -- in the Stroz Friedberg report. Or maybe I  
9 missed it.

10          MR. SOUTHWELL: That is a good question,  
11 your Honor.

12          MR. BOLAND: They didn't even find the  
13 program, your Honor. It's not even on the  
14 computer. So they have no idea when it was used.  
15 The program itself doesn't exist or anything like  
16 it on the computer according to their report.

17          MR. SOUTHWELL: Right. But what does  
18 exist is documents which include phrases like "this  
19 is a Word document that has been newly created. I  
20 will test how the coding comes into the hex  
21 editor."

22          THE COURT: What I'm trying to drive at is  
23 it just sort of amateur's effort to self-aggrandize  
24 him or herself because they now have this text  
25 editor thing that they can play with and manipulate



1 and feel like they're engaging in some sort of  
2 high-tech, you know, manipulation, and wow, isn't  
3 this neat. I'm able to you fool around with it  
4 with a hex editor. But does it necessarily follow  
5 that it was used in connection with committing the  
6 fraud that's alleged here against the defendant?

7 MR. SOUTHWELL: I think it certainly does,  
8 your Honor. It certainly does.

9 MR. SNYDER: Your Honor, let me just --

10 THE COURT: I don't want to dwell on it  
11 this. It's just that --

12 MR. SNYDER: Your Honor, what it shows --

13 THE COURT: I have dwelled on it.

14 MR. SNYDER: What it demonstrates I think  
15 by clear and convincing evidence if not beyond a  
16 reasonable doubt that Mr. Ceglia created the Work  
17 for Hire document by merging a new fake page 1 with  
18 an already existing document, page 2 of the  
19 authentic StreetFax contract, and then used a hex  
20 editor and other forensic manipulations to try to  
21 create fingerprints on page 1 of the document that,  
22 when forensic experts looked at it, it will look  
23 like it was created in 2003. And so this program  
24 in this context is used to edit raw data that make  
25 up the file, rather than the text of the file, and

1 indeed that was his attempt to create an electronic  
2 version of the document that contains a 2003, what  
3 I would say is metadata.

4 Now, if there's any doubt about that --

5 THE COURT: But you don't need hex editor  
6 capability to manipulate metadata.

7 MR. SNYDER: No, but that is -- it's a  
8 tool in the same way -- there are lots of ways to  
9 commit a murder. There's lots of ways to commit  
10 document forgery.

11 THE COURT: That's my point. I had the  
12 impression from Stroz Friedberg that his  
13 manipulation of metadata was based on other --

14 MR. SNYDER: It was manifold.

15 THE COURT: Other high-tech interventions  
16 by the plaintiff, not from the hex editor.

17 MR. SNYDER: Yes. It is manifold, meaning  
18 the test forgeries and the other forensic data  
19 revealed multiple attempts, some successful, some  
20 not, to manipulate metadata. There was backdating  
21 for sure, but there also was the use of the hex  
22 editor, and then, of course, there was what I would  
23 say is undeniable proof of -- of document --

24 THE COURT: Stroz Friedberg actually say  
25 that the hex editor technique was used to create

1 the fake Work for Hire contract.

2 MR. SOUTHWELL: Yes. If you refer to  
3 page 42 of the Stroz Friedberg report, they refer  
4 to this document that was discovered on  
5 Mr. Ceglia's computer called --

6 THE COURT: Just a second. Wait a minute.  
7 Forty-two?

8 MR. SOUTHWELL: 42.

9 THE COURT: You have that, right,  
10 Mr. Boland?

11 MR. BOLAND: Yes, your Honor, if they're  
12 talking about the report that was provided by Stroz  
13 Friedberg.

14 THE COURT: You have it right there -- you  
15 probably have it right there on the screen because  
16 you're so high tech, right? You're totally  
17 automated. Completely automated lawyer. Okay.  
18 I've got page 42. Go ahead, Mr. Southwell.

19 MR. SOUTHWELL: Yes, your Honor. It  
20 refers to the SFwebWorkforHireMZ.com file.

21 THE COURT: Yes, I've read that.

22 MR. SOUTHWELL: Which was one of --  
23 earlier in the Stroz Friedberg report they talk  
24 about the seven backdated versions of the Work for  
25 Hire document, unsigned versions.

1 THE COURT: Yes.

2 MR. SOUTHWELL: This is one of them. And  
3 as Stroz Friedberg reports, shows evidence of the  
4 use of a hex editor or similar tool --

5 THE COURT: Yes.

6 MR. SOUTHWELL: -- and they then explain  
7 how they see that. And the reason they see that  
8 and come to that conclusion is that when viewing  
9 the metadata of the file using a common program  
10 called Metadata Assistance, it appears there's no  
11 information.

12 And then if they -- if you turn the page to 43,  
13 all right, so using a normal tool, it's blank if  
14 you will. There's no information of metadata.  
15 When they have then used a more sophisticated  
16 forensic tool, which they describe on page 43,  
17 there is, in fact, metadata found, and it indicates  
18 that the document originated in a certain folder.  
19 The folder is C:\documents and settings:iasia,  
20 I-A-S-I-A \My Documents\StreetFax\contracts\work  
21 for hires. And it was authored by the user Brendan  
22 Ceglia.

23 THE COURT: Who is Brendan Ceglia?

24 MR. SOUTHWELL: We understand that is the  
25 plaintiff's brother.

1 THE COURT: So the plaintiff's brother was  
2 involved in manufacturing the fake Work for Hire  
3 contract using hex editor, is that what this says  
4 in layman's language?

5 MR. SOUTHWELL: That a computer and user  
6 registered to him, whether it was him or it was, in  
7 fact, you know, Mr. Paul Ceglia --

8 MR. SNYDER: If you recall, your Honor,  
9 this is not first time we've encountered Brendan  
10 Ceglia in this case. It was his daughter who was  
11 the recipient supposedly of confidential emails  
12 that they tried to --

13 THE COURT: I don't remember the name of  
14 the father, which is -- I may have missed that.

15 MR. SNYDER: It was Jessica Ceglia --

16 THE COURT: I remember her. Yes, I  
17 remember her being mentioned. I didn't recall  
18 Brendan, however. So that's what I'm -- that's the  
19 answer to my question --

20 MR. SOUTHWELL: Yes, your Honor.

21 THE COURT: If I read this with or without  
22 Mr. Healy's assistance, which I'll probably have to  
23 ask for, I'll eventually get it straight that  
24 this -- this text and this -- this -- and these two  
25 pages of the Stroz Friedberg report assert that

1 the -- that a person by the name of Brendan Ceglia  
2 had something to do with the creation of the fake  
3 first page of the Work for Hire document using the  
4 hex editor capability.

5 MR. SOUTHWELL: Yes, and specifically,  
6 your Honor, the conclusions Stroz Friedberg makes  
7 is that there are changes that have been made to  
8 the file in such a way that do not preserves its  
9 structure, including metadata, which is indicative  
10 of the use of a hex editor or similar tool to  
11 manipulate the file.

12 THE COURT: So it is relevant?

13 MR. SOUTHWELL: Yes, your Honor.

14 THE COURT: Thank you. Okay. I'm glad I  
15 asked.

16 MR. SNYDER: Your Honor, there's one more  
17 issue I just want to address, because it is  
18 addressed in the opposition brief, which is  
19 statements made by plaintiff's counsel concerning  
20 what we call the spoliation of the original  
21 contract when Mr. -- the yellowing of the document.  
22 And this is another example of counsel making  
23 irresponsible statements to this Court without a  
24 good-faith basis in fact. So, the objective  
25 evidence, meaning photographs and videos taken

1 minutes after Mr. Argentieri removed the  
2 documents --

3 THE COURT: We're now talking about the  
4 baking problem?

5 MR. SNYDER: Yes -- from the envelope are  
6 crystal clear on this point. There's no discovery  
7 needed, your Honor, using common sense and good  
8 judgment as a fact finder can look at those  
9 photographs, can look at those videos, and can see  
10 that the document that Mr. Argentieri took out of  
11 the envelope after having it in his possession,  
12 custody, and control throughout this litigation in  
13 a safe deposit box --

14 THE COURT: Well, unless --

15 MR. SNYDER: -- is yellowed.

16 THE COURT: Yeah.

17 MR. SNYDER: And there is no claim that  
18 we, the defendants, had any access to that document  
19 between January when his experts copied one version  
20 of it and it was white and July when Mr. Argentieri  
21 removed it, put it on the table before we touched  
22 it, and it was photographed. Your Honor, can look  
23 at those photographs, look at the time stamp, and  
24 again, unless the martians landed and somehow  
25 changed the time and date stamp on the camera,

1 maybe there's an allegation that Mr. Zuckerberg or  
2 someone hacked into the camera of the expert, or --  
3 so -- so what happens is every time we have  
4 evidence of fraud, they make up stuff. They don't  
5 swear to it. They don't certify pursuant to  
6 Rule 11. Mr. Ceglia says nothing, it's always  
7 counsel. And then sometimes the counsel leave the  
8 lawsuit, and we can't even ask them where they --

9 THE COURT: Mr. Snyder, eye contact helps  
10 so I can butt in here a little bit. Thank you.  
11 Now that you brought this up, I recall at an  
12 earlier argument there was some reference to you  
13 knowing who had access to, and who actually opened  
14 the safe deposit box.

15 MR. SNYDER: Yes.

16 THE COURT: And I had the impression you  
17 were going to make something of that in connection  
18 with the baking problem.

19 MR. SNYDER: We will make something of  
20 that in further proceedings. We think that's  
21 relevant, not to the motion to dismiss, whether  
22 Mr. Argentieri had or did not have access to it.  
23 But we can -- there is no dispute that between  
24 January when plaintiff's experts copied the one  
25 version of the original contract, and that's a



1 white and not the discolored copy, and in July when  
2 Mr. Argentieri produced it, there's no suggestion  
3 that we had access to that document.

4 THE COURT: No, no, I thought you were  
5 going to bolster your argument by giving the Court  
6 a certified copy of some sort of an affidavit from  
7 a bank executive who would provide the  
8 authentication for the records of person signing in  
9 and out for the safe deposit box during that  
10 relevant time frame.

11 MR. SNYDER: To be honest, we could have.  
12 The reason we didn't is because we think the  
13 dispositive relevant fact, which is undisputed, is  
14 that the document was within the plaintiff's and  
15 his agent's custody and control from January until  
16 the minute Mr. Argentieri removed it in its  
17 spoliated, discolored fashion. And I will note  
18 Mr. Argentieri isn't here to address it. But I  
19 will note that Mr. Argentieri knew or should have  
20 known, but failed to disclose to this Court that  
21 the document that he removed from the envelope was  
22 a completely different color and in a completely  
23 different condition than the document that his  
24 experts copied in January, much less a different  
25 copy than the one attached to his complaint.

1 That's a separate issue.

2 But certainly when Mr. -- when Mr. Flynn,  
3 Mr. Benjamin, Mr. Southwell, and Miss Aycock and  
4 all their experts looked at that document, there  
5 was a gasp in the room because it looked so  
6 different. Mr. Argentieri knew it looked  
7 different, never told this Court that.

8 THE COURT: My point is that when it was  
9 tendered to -- which expert was it for the  
10 plaintiff who looked at it, Ajenski?

11 MR. SNYDER: Yes, your Honor.

12 MR. SOUTHWELL: Ajenski and Mr. Osborne.

13 THE COURT: Osborne and Ajenski. Was it  
14 tendered to them physically by the plaintiff  
15 himself in person?

16 MR. SNYDER: They swore to this Court that  
17 they took a -- yes, a -- a --

18 THE COURT: Who hand it had to them?

19 MR. SOUTHWELL: Mr. Argentieri.

20 MR. SNYDER: Mr. Argentieri.

21 THE COURT: Mr. Argentieri.

22 MR. SNYDER: Yes, he did. He handed them  
23 a white document that was not miscolored, but  
24 handed us a yellow one that was miscolored.

25 THE COURT: And the question I have is if

1       it's just all Ceglia's signatures -- who was on the  
2       safe deposit box?

3               MR. SOUTHWELL: Your Honor, we do have  
4       records that Mr. Lake has provided. They show  
5       Mr. Argentieri and Mr. Ceglia signing the documents  
6       out. We'd be happy to provide those, your Honor,  
7       but there's no dispute --

8               THE COURT: But the intriguing question is  
9       how many times did it get signed out and by whom?

10              MR. SNYDER: Right. The records are  
11       not --

12              THE COURT: And for what period of time?

13              MR. SOUTHWELL: The records show access to  
14       the box. They don't, in fact, show whether it was  
15       signed out or brought back. But the point --

16              THE COURT: How does that work?

17              MR. SNYDER: In fact, your Honor, we  
18       thought of pursuing this. In other words we  
19       thought of pursuing evidence from the safe -- from  
20       the bank, maybe witnesses to prove that up. But  
21       frankly, your Honor, there comes a point in time  
22       when enough is enough. Do I think that if that  
23       issue was tested that we would be able to --

24              THE COURT: I'll bet you now that I asked  
25       about it, you're rethinking your position.

1 MR. SNYDER: Maybe Mr. Flynn will --

2 THE COURT: All I'm asking is very simple  
3 questions. Isn't it so that when the bank allows  
4 somebody to go into a safe deposit box, they don't  
5 allow you to walk out with it unless there's some  
6 sort of receipting process so the bank doesn't get  
7 accused of negligence?

8 MR. SOUTHWELL: I don't know the  
9 procedures of this bank.

10 THE COURT: Well, I mean, if it came out  
11 of the box, how could it be exposed to ultraviolet  
12 light with clothes pins if it didn't leave the  
13 premises?

14 MR. SNYDER: It did leave the premises.

15 THE COURT: That's exactly my point.

16 MR. SNYDER: It left the premises. We  
17 don't know exactly for how long.

18 THE COURT: But that's -- how can -- I  
19 mean, the bank, do they let people open safe  
20 deposit boxes and walk out with the contents only  
21 to be (indiscernible) at a later time? I don't  
22 think so.

23 MR. SNYDER: We -- the point is, there's  
24 no question that Mr. Argentieri, Mr. Ceglia took  
25 physically an original document out of the safety

1       deposit box and took it somewhere.

2               THE COURT:   How do you know that?

3               MR. SNYDER:   The records show that.

4               THE COURT:   That's what I'm asking, what  
5       does the record show?

6               MR. SOUTHWELL:   Your Honor, to be clear  
7       there's no dispute that it was in plaintiff's  
8       custody prior to when it was produced to us in  
9       July.

10              THE COURT:   Well, from a legal point of  
11      view.  I'm trying to understand about the physical  
12      point of view.

13              MR. SOUTHWELL:   The experts, Mr. Ajenski  
14      and Osborne have stated that they received the  
15      document in Chicago, that Mr. Argentieri brought it  
16      to them in Chicago essentially.  Mr. Argentieri has  
17      told us that he took it out of the safe deposit box  
18      and brought it to the experts in Chicago.  The  
19      safety deposit box records show accesses to the  
20      box.  They do not, in fact, show what was taken out  
21      or what was put in.  They show accesses.  The only  
22      accesses -- and there are dates -- are by  
23      Mr. Ceglia or Mr. Argentieri.  We'd be happy to  
24      provide that to your Honor.  Because there's no  
25      dispute that the document was in the custody and

1 control of the plaintiff prior to --

2 THE COURT: Or his agent.

3 MR. SOUTHWELL: Or his agents prior to  
4 ever being presented to our experts, it was just  
5 not a germane fact to that point.

6 THE COURT: Thank you. Anything else,  
7 Mr. --

8 MR. SNYDER: No, your Honor. Thank you  
9 for the time. I appreciate it.

10 THE COURT: Do we need a break,  
11 Mr. Boland?

12 MR. BOLAND: Yes, your Honor. Thank you.

13 THE COURT: A break?

14 MR. BOLAND: A brief break would be fine.

15 THE COURT: How much time would you like?

16 MR. BOLAND: Ten minutes, your Honor.

17 THE COURT: Ten minutes. Okay, we'll  
18 resume in ten minutes.

19 MR. SNYDER: I would just like -- I'm  
20 sorry, your Honor. I would just like --

21 THE COURT: Just a second please. Still  
22 on the record.

23 MR. SNYDER: I just want it on the record,  
24 Miss Aycock has written for me a quote that  
25 Mr. Dumain did make to the Wall Street Journal.

1 THE COURT: Who, Mr. Dumain?

2 MR. SNYDER: Dumain I think.

3 THE COURT: Dumain. Is it pronounced  
4 Dumain, sir?

5 MR. DUMAIN: Yes, your Honor.

6 MR. SNYDER: Quote, "It didn't take  
7 sophisticated hacking to send something from that  
8 account", period, close quote. Wall Street Journal  
9 quote attributed to Mr. Dumain on Mr. March 27th,  
10 2012. I think Mr. Dumain just told, your Honor, he  
11 didn't say that when I said hacking and planting,  
12 perhaps he was being literal because maybe he  
13 didn't use the verb plant but he certainly used the  
14 word hack and by that statement, not certified  
15 under Rule 11, I don't know what the good-faith  
16 basis in fact is for it.

17 THE COURT: Well, we'll find out.

18 MR. SNYDER: He is accusing my client of  
19 hacking into a computer, a criminal act, to send  
20 the authentic StreetFax contract to Sidley and  
21 Austin, an audacious and outlandish claim if  
22 there's no evidence for it, and there is no  
23 evidence.

24 THE COURT: We'll explore that further. A  
25 ten-minute break.

1 MR. BOLAND: Thank you, your Honor.

2 (Short recess was taken.)

3 THE CLERK: Continuation of Rule 16(b)  
4 hearing and oral argument on defendants' motion to  
5 stay discovery.

6 THE COURT: By the way, on that  
7 Rule 16(b), the reason this is a Rule 16(b)  
8 conference is because -- this is not criticism --  
9 contrary to what we were told back in December, we  
10 did not see the imminent motion to dismiss. And I  
11 realize, now that I see it, why that would be. But  
12 not having heard anything, I felt rather than start  
13 communicating with defendants in a way that would  
14 suggest in any shape or form favoritism, I would  
15 just put out a Rule 16(b) invitation and see what  
16 happened. And this is what happened. So --

17 MR. SOUTHWELL: We appreciate that, your  
18 Honor. As I said, we were hoping to file in  
19 September, and -- and when we saw --

20 THE COURT: In January.

21 MR. SOUTHWELL: In September of 2011 we  
22 actually we thought --

23 THE COURT: Well, I know, but --

24 MR. SOUTHWELL: -- we would file  
25 originally, and then in January, but we kept on



1 finding the evidence under the rocks.

2 THE COURT: I understand -- well, no, no  
3 it's not a criticism. I just want to comment as to  
4 why the Rule 16(b) invitation was sent. It wasn't  
5 because I felt that there had to be a Rule 16(b)  
6 conference. But I felt I had not received any  
7 indication from defendants about the imminency or  
8 lack thereof --

9 MR. SOUTHWELL: Yes, your Honor.

10 THE COURT: -- of the motion, and  
11 therefore my obligation as the case management  
12 Judge was to issue the order. It was not because  
13 Judge Arcara, contrary to Mr. Boland's belief,  
14 directed it.

15 MR. SOUTHWELL: Thank you.

16 THE COURT: Oh, by the way, just to let  
17 you know.

18 MR. BOLAND: I was commenting on the  
19 preamble to the order.

20 THE COURT: I know.

21 MR. BOLAND: I misunderstood.

22 THE COURT: I know. That's just a minor  
23 point. I just wanted to clear the air on that --

24 All right. Mr. Boland and Mr. Dumain, you have  
25 the floor.

1 MR. BOLAND: Your Honor, as --

2 THE COURT: How do I ignore all of the  
3 seemingly persuasive indicia or troublesome  
4 indicators of potential fraud?

5 MR. BOLAND: One way, your Honor, is full  
6 discovery for our side, because you haven't heard  
7 half the story. So it's like the old law school  
8 analogy, you come around the corner -- you heard a  
9 gun shot, you run around the corner, and there's a  
10 person lying there bleeding and someone over them  
11 holding a gun. What's your first reaction? Wow,  
12 they just shot them. And then you walk up and ask  
13 the person what happened, and it turns out later  
14 they're telling the truth, and they say someone  
15 just walked by and shot my friend. Totally  
16 different story.

17 THE COURT: Yeah, but if you have a  
18 confession --

19 MR. BOLAND: My point is, your Honor, your  
20 first instinct about something is not always the  
21 right one until you get the other half of the  
22 story.

23 THE COURT: I see. So, do -- do any of  
24 your experts say that the -- or do you say that the  
25 StreetFax contract that was discovered in the

1 plaintiff's emails with Mr. Kole is a fabrication  
2 in itself and is not the original contract?

3 MR. BOLAND: Well, the defendants have  
4 offered no evidence to authenticate the document.

5 THE COURT: What do you say?

6 MR. BOLAND: Well, what I say, your Honor  
7 is first of all, the metadata -- we've only had  
8 what four or five days to review what you pointed  
9 out is hundreds of pages.

10 THE COURT: But the StreetFax contract has  
11 been submitted to you since last summer.

12 MR. BOLAND: Yes, your Honor. On that  
13 point I can speak. We've had --

14 THE COURT: That's the point I'm talking  
15 about.

16 MR. BOLAND: Well, we weren't sure what  
17 their motion to dismiss was going to --

18 THE COURT: Is it a fraud?

19 MR. BOLAND: -- to discuss. Is the  
20 document was not created by our side, so whoever  
21 created a fraudulent --

22 THE COURT: Well, I mean, you've had --  
23 excuse me.

24 MR. BOLAND: A fraudulent document, yes.  
25 It's not the contract between these two parties.

1 THE COURT: Have your experts reviewed it?

2 MR. BOLAND: The document itself?

3 THE COURT: Yes.

4 MR. BOLAND: Yes, we have experts who have  
5 looked at it. And we're going to have expert  
6 reports as part of our response.

7 THE COURT: And do they say it's a fraud?

8 MR. BOLAND: They indicate that it claims  
9 to be a scan, but has no metadata of being a scan.  
10 That's a problem.

11 THE COURT: Has no metadata of being a  
12 scan.

13 MR. BOLAND: Scanners, when you scan a  
14 document into electronic format, put -- typically  
15 put metadata into that file including the name  
16 Canon scanner, HP, Epson, whatever it might be.  
17 The defendants claim that document was scanned by  
18 someone. Mr. Ceglia is their target of choice,  
19 although they have no evidence he created that  
20 document at all. And yet the metadata embedded in  
21 that document strangely has the information  
22 regarding the scanner stripped out by someone. So  
23 who -- who took that out? Perhaps the defendants  
24 know about the use of a hex editor in the  
25 production of that document, but we certainly

1 don't.

2 So now it's not even clear that document was  
3 scanned by anyone.

4 THE COURT: But it also was found on one  
5 of Mr. Ceglia's drives, wasn't it?

6 MR. BOLAND: No, your Honor, that's a good  
7 point. The persuasiveness that you asked about  
8 should connect somehow to the credibility of what  
9 you're hearing. That, in fact, is something the  
10 Court is being misled about in pleadings  
11 constantly. The defendants are very careful to not  
12 delineate what evidence they're finding on my  
13 client's computers and what evidence they're  
14 finding on his parent's computer, a computer that  
15 he never had access to, he never owned, he never  
16 purchased.

17 THE COURT: So the parents sent Mr. Kole  
18 the document even though your client, on the  
19 record, asserted a an attorney-client privilege  
20 between himself and Mr. Kole as to the document.

21 MR. BOLAND: Your Honor, I am not  
22 saying --

23 THE COURT: Not inconsistent?

24 MR. BOLAND: It's not inconsistent and  
25 here's why.

1 THE COURT: Because?

2 MR. BOLAND: Because the privilege logs  
3 that we obtained and the documents therein, first  
4 of all, were reviewed by prior to counsel simply  
5 say from lawyer to client. And then the contents  
6 therein are reviewed, and then there was an  
7 assertion of privilege made based on whatever  
8 communications Mr. Lake and Mr. Ceglia had on that  
9 matter.

10 THE COURT: No, no, Mr. Kole and  
11 Mr. Ceglia.

12 MR. BOLAND: I understand, your Honor.  
13 I'm talking about the privilege assertion in this  
14 case.

15 THE COURT: The privilege assertion was  
16 between -- by Mr. Lake --

17 MR. BOLAND: Yes.

18 THE COURT: -- on behalf of Mr. Ceglia,  
19 that the communication wherein the -- what the  
20 defendants call the smoking gun actual StreetFax  
21 contract was attached --

22 MR. BOLAND: Correct.

23 THE COURT: -- was privileged. And that  
24 assertion was made on behalf of Mr. Ceglia by  
25 Mr. Lake, and I had to rule on it. And I did. And

1 I overruled it. And Mr. Lake didn't appeal. So if  
2 Mr. Ceglia through his agent Mr. Lake is asserting  
3 a privilege as to such document, including the  
4 StreetFax contract that we are now talking about,  
5 purportedly the original and only agreement between  
6 plaintiff and defendant, how can it not be said  
7 that the document was in your client's possession  
8 at the time that was transmitted?

9 MR. BOLAND: First of all, your Honor,  
10 this is an email purporting to be from eight years  
11 ago.

12 THE COURT: You understand the question?

13 MR. BOLAND: I do understand the question.  
14 My client sent a bunch of emails to Jim Kole and  
15 has no specific recollection of this email being  
16 sent, and he said so on the record.

17 THE COURT: That's not what he told his  
18 lawyer to tell this Court back in -- whenever the  
19 issue was argued.

20 MR. BOLAND: Well, I don't know what his  
21 specific conversation was with Mr. Lake. I wasn't  
22 there. But he --

23 THE COURT: Well, you can have asked him.

24 MR. BOLAND: I could have.

25 THE COURT: It's a pretty serious problem,

1       isn't it?

2               MR. BOLAND: I don't think so, your Honor,  
3       because I think he can assert privilege over an  
4       email that he doesn't recall whether he sent it or  
5       not to just say, look, it appears to be a  
6       communication with my lawyer, assert the  
7       privilege --

8               THE COURT: I distinctly remember  
9       Mr. Lake's very, very vigorous argument in that  
10      regard, and I don't recall any equivocation on his  
11      part relating to his -- Mr. Ceglia's insistence  
12      that this was a privileged communication between  
13      himself and Mr. Kole. And now you're telling me in  
14      that retrospect Mr. Ceglia is saying, well, not so  
15      much. I don't really recall it. I have no idea  
16      why I told Lake to say all of that. Is that what  
17      you're trying to tell me?

18              MR. BOLAND: No, your Honor. What I'm  
19      telling you is the email was not sent from my  
20      client's email account. It was sent from his  
21      parent's email account to the lawyer.

22              THE COURT: Well, a copy of it resided on  
23      his hard drive, didn't it?

24              MR. BOLAND: No, your Honor. It resided  
25      on his parent's computer. And --



1           THE COURT:   So his parents sent it -- why  
2       would they send it to Mr. Kole?

3           MR. BOLAND:   No, your Honor.   I'm not  
4       saying his parents sent the email.   An email was  
5       sent from their account.   I could sit behind your  
6       computer -- if you give me your credentials, I can  
7       send an email from your account.   You didn't send  
8       it.   That's what we're saying.

9           THE COURT:   Perhaps his brother, Brendan,  
10      the one that allegedly had some involvement with  
11      the hex -- H-E-X, for the court reporter.   H-E-X,  
12      right -- editor usage, perhaps he sent it?

13          MR. BOLAND:   Your Honor, discovery is  
14      going to help perhaps us answer those question.

15          THE COURT:   The family pet came and  
16      somehow put his paw on the computer keyboard and it  
17      got sent, or computer poltergeist got into the  
18      family home and did it?

19          MR. BOLAND:   No, your Honor.   It's more  
20      straightforward than that.   The only person  
21      involved in this case who has all of the  
22      credentials to access that email account is Mark  
23      Zuckerberg.   He had them back in 2003 and 2004 when  
24      he had --

25          THE COURT:   So we're back to the hacking

1 cyber warfare TV show 24 technique argument that  
2 Mr. Lake proffered way back last summer, but has  
3 never been developed or supported by Mr. Ceglia?

4 MR. BOLAND: No, your Honor. This is one  
5 of the key reasons --

6 THE COURT: Or is even in your papers in  
7 favor of -- I mean, is that why you want to go into  
8 all the computers at Facebook and examine each and  
9 every one of them to see whether or not there's  
10 some evidence of electronic cyber warfare going on  
11 here?

12 MR. BOLAND: That statement was never  
13 made, your Honor. So I have no interest in going  
14 to every one of Facebook's computers. There was  
15 no --

16 THE COURT: I thought --

17 MR. BOLAND: -- demand made. That's  
18 Mr. Southwell's recollection of the conversation,  
19 or perhaps out of a context comment, whatever he's  
20 making.

21 THE COURT: The question withdrawn.

22 MR. BOLAND: No interest.

23 THE COURT: All right. Would you say that  
24 all of the experts that are involved in this very  
25 voluminous report are incompetent?

1 MR. BOLAND: All of them?

2 THE COURT: Yes.

3 MR. BOLAND: No. One of them is --

4 THE COURT: Who's that?

5 MR. BOLAND: -- for sure. Gerald LaPorte.

6 Who is offering testimony about a test, the PE  
7 test, which is the lynchpin of their case, that the  
8 interlineations on page 1 are somehow less than two  
9 years old. This test -- what they don't tell you,  
10 he's -- Mr. LaPorte has been carrying this around  
11 to federal and state courts for years trying to get  
12 it past Daubert and has failed. He has like the  
13 Energizer Bunny of junk science.

14 This test has absolutely no reliability behind  
15 it. Again, expert discovery will bring that out  
16 and perhaps even a Daubert hearing, because this is  
17 not something the Court should rely on. It's  
18 akin -- it's not even reliable as astrology,  
19 because that's more accurate.

20 THE COURT: How about Stroz Friedberg's  
21 finding relative to the apparent fabrication of the  
22 so-called Ceglia-Zuckerberg emails regarding  
23 StreetFax -- excuse me, regarding Facebook, are  
24 they also based on junk science?

25 MR. BOLAND: They're not, your Honor. But

1        what they do is they don't follow the trail all the  
2        way to the end. I'll give you a perfect example of  
3        what Mr. Snyder brought up in his comments to you.  
4        He told you about you couldn't imagine a more  
5        egregious conduct by a party than Mr. Ceglia  
6        deleting the contents of his getzuch@gmail.com  
7        account. On page 25 of Stroz Friedberg's report --  
8        it's document 325 at the bottom -- not only if you  
9        read those two paragraphs, that's not what they  
10       say. They never say there were any emails in that  
11       account that were deleted. Mr. Snyder is  
12       misleading the Court about what that paragraph  
13       says. It's right there in black and white.

14       In addition, they use words throughout their  
15       report that are not the words of experts. Like, it  
16       is likely this happened. It is presumedly the  
17       case, which is in this Get Zuch paragraph. The  
18       only evidence they have that they put in their  
19       report is an email mentions the activation of a  
20       Facebook account, and the email address that you  
21       have to use to get a Facebook account, as they  
22       should know, is included in the reference. They  
23       don't say in that paragraph that a getzuch@gmail  
24       account email was ever sent from that account.

25       THE COURT: No, no, you didn't catch my --

1       you didn't catch my question. I'm referring to the  
2       extensive discussion in the Stroz Friedberg report  
3       regarding the question of whether the emails  
4       attached to the amended complaint were  
5       fabrications.

6               MR. BOLAND: Yes, I am aware of that, your  
7       Honor.

8               THE COURT: That's what I'm asking you  
9       about. Is that incompetent expert opinion?

10              MR. BOLAND: It is, and I'll tell you why.  
11       Because they use the same weasel words in there,  
12       same things -- and I've read it once or twice now,  
13       and I'll read it again, because they keep popping  
14       up. Every time you read the report, you see more  
15       qualifiers like this in that specific topic. They  
16       say there's no way these emails could have these  
17       time stamps because of the difference between  
18       daylight savings time, provided the computer clock  
19       was correctly set.

20              Well, that begs the question, was the computer  
21       clock correctly set? Did someone set it? Did a  
22       program reset it? Did Mr. Ceglia travel somewhere  
23       to a time zone where he reset it? They have no  
24       idea. So, assuming a fact they don't know, which  
25       could convert their whole conclusion to nonsense,

1       they then give you this conclusion which appears to  
2       be strong. And it's throughout their report, your  
3       Honor. Virtually every conclusion they give has  
4       they qualifiers.

5             The hex editor is another one. They say a hex  
6       editor or similar program was used. Okay. What  
7       program? When was it installed? Guess what, your  
8       Honor? There's no evidence of a program like that  
9       installed anywhere on any computer. So they could  
10      have said -- Mr. Snyder's words -- we have evidence  
11      that aliens came down and did this. Of course,  
12      they have no evidence of aliens involved in the  
13      computer at all.

14            And, in fact, a hex editor is so common a  
15      program that I used one last week to solve a  
16      problem of metadata creation dates in my files  
17      being messed up from this case, and from the  
18      production from the defendants. Things happen on  
19      computers. Programs cause metadata to change and  
20      were fouling up my ability to synchronize files.  
21      So I used a hex editor to correct the dates on my  
22      files. It's very commonly used for a number of  
23      issues to correct problems with computers, and the  
24      defendants know that.

25            THE COURT: You don't deny that it was

1 found on his -- on some of his Microsoft Word  
2 files.

3 MR. BOLAND: What was found?

4 THE COURT: Hex editors.

5 MR. BOLAND: No, your Honor. The report  
6 does not -- the report says that the contents of  
7 some Word documents had words like hex editor in  
8 them. I'm testing things with a hex editor.  
9 There's no evidence a hex editor was used. What  
10 they say is, you know, the metadata of some of  
11 these files --

12 THE COURT: Why would somebody using the  
13 computer assert the usage of a hex editor if they  
14 weren't using it? And I had the impression from  
15 the report, and as explained further by  
16 Mr. Southwell, that the objective indicia of such  
17 use confirmed that indeed it was used by  
18 Mr. Brendan Ceglia.

19 MR. BOLAND: Your Honor, it doesn't  
20 confirm it. It's subjective entirely. They find  
21 things like metadata which doesn't look right and  
22 then they simply conclude hex editor is the  
23 solution.

24 THE COURT: All right. We'll go further  
25 with this.

1 MR. BOLAND: Very well.

2 THE COURT: What I'm trying to understand  
3 is, if you have all of they powerful counter  
4 arguments that, in your opinion, undermine the  
5 competency of these expert -- plethora of expert  
6 opinion, why isn't it your papers? Why do you -- I  
7 mean, you now say well, we're back to the fact that  
8 the StreetFax contract was somehow embedded  
9 improperly in Mr. Ceglia's -- well, in the parent's  
10 computer, that it didn't exist on his hard drive.  
11 You don't address the fact that if he -- that if  
12 the Work for Hire contract was authentic, why is  
13 there no electronic record of it in any of his --  
14 in any of the media that he turned over to the  
15 defendants for examination? There's utterly no  
16 comment on that, Mr. Boland, in your papers.

17 MR. BOLAND: Your Honor, the defendant --

18 THE COURT: I'm the one that's raising it  
19 because I'm concerned about why isn't in your  
20 papers.

21 MR. BOLAND: And I can answer that  
22 question.

23 THE COURT: And what's that?

24 MR. BOLAND: The defendants have had nine  
25 months to put together these hundred pages. We've



1 had less than less than nine days to go through.

2 THE COURT: That's not true. You've had  
3 all of the paperwork, all of the discovery at your  
4 disposal since the lawsuit was started.

5 MR. BOLAND: Your Honor --

6 THE COURT: You've had experts look at it  
7 preliminarily. You knew that they were going to  
8 make this motion to dismiss, although it took them  
9 longer than expected. And now you're telling me  
10 that you're surprised by all of this expert  
11 analysis and accusation?

12 MR. BOLAND: No, your Honor, that's not my  
13 point. My point is the conclusions in their  
14 hundreds of pages of reports are --

15 THE COURT: Let me put it to you this  
16 way --

17 MR. BOLAND: -- are very specific  
18 things --

19 THE COURT: Are you saying that none of  
20 your experts or any experts that you might retain  
21 or intend to retain to prosecute this case have  
22 offered to you any preliminary opinions supporting  
23 the authenticity of this contract?

24 MR. BOLAND: Yes, they've already provided  
25 them in prior pleadings. There's issues in dispute

1 with their various expert reports, the toner, the  
2 paper, the ink, Mr. Zuckerberg's signature, the  
3 staple hole issue. They're merely rebutting stuff  
4 in most of those papers that we've already  
5 submitted in declarations to be the opposite, the  
6 classic dueling experts. It's already there. We  
7 need discovery to fully address every specific  
8 opinion they issued there, and frankly --

9 THE COURT: You might need a deposition.  
10 You got their report in effect. But what other  
11 discovery, if you will, do you feel you need in  
12 order to counter act this avalanche of -- of  
13 evidence pointing towards the conclusion that the  
14 defendants are drawing, which is that the document  
15 on which your client is suing is a fake?

16 MR. BOLAND: First of all, your Honor, it  
17 won't be an avalanche once we have a full  
18 opportunity to explore a bunch of conclusions in  
19 there that, frankly, we didn't anticipate, because  
20 they're not supported by science. Our experts  
21 didn't think, for example, that one of their  
22 experts would come forward with a PE test that is  
23 complete junk science, and then try to support  
24 their entire case with that.

25 So now they've done so. Now our experts need

1 time to not only respond, but that expert needs to  
2 be held to account in a deposition and full  
3 discovery as to why he did that. In addition, the  
4 comments that were being made by Mr. Lesnevich  
5 where he claims to have drawn lines on letters, and  
6 then the conclusion he drew, there must be another  
7 paper document. That's the only solution. That  
8 conclusion --

9 THE COURT: No, that's not the conclusion.  
10 The conclusion is that if there was only one  
11 authentic document, how can there be two that --  
12 and we know there are more than one because of the  
13 difference in the lettering.

14 MR. BOLAND: Correct. But what he ignores  
15 in there --

16 THE COURT: But that's the point.

17 MR. BOLAND: We had no idea that they were  
18 going to make that conclusion. Here's why.  
19 Because it's not supported by anything they have in  
20 their evidence. What he ignores, for example, your  
21 Honor, is there are more than 20 parts of those two  
22 compared pieces of writing that are exact  
23 duplicates that are incapable of a human being  
24 creating them exactly. So what the logical  
25 conclusion will be from our experts is, the result

1 of these differences that he points out are created  
2 by machines scanning and scanning and quality of  
3 scans, and it could not possibly be a human writing  
4 those words twice on two different documents that,  
5 in the majority of their aspects, they completely  
6 overlay.

7 No expert on our side or their side is going to  
8 say a human being can write a sentence twice and  
9 have the majority of it or any of it be an exact  
10 duplicate, overlay perfectly. And most of those  
11 words do, which tells you a human being didn't do  
12 that. There are two scans. Let me just emphasize  
13 that for the record.

14 THE COURT: Two scans of what?

15 MR. BOLAND: Lesnevich in his report is  
16 examining two scans, two electronic documents and  
17 saying because I see differences in these, I  
18 conclude there's two different underlying paper  
19 documents. That conclusion is not supported by  
20 anyone in his field at all. It won't pass Daubert,  
21 and that's why we need full discovery definitely on  
22 the experts for that issue. And all the issues  
23 that they raise, the toner, the paper differences,  
24 the staple holes. We have to go after all of them  
25 because they're simply either going to be proven to

1 be wrong, or at the very least, our experts will  
2 have all the credible testimony needed to  
3 demonstrate that this is a jury question.

4 THE COURT: Well, what testimony --  
5 what -- I'm listening carefully. I'm trying to  
6 understand. Conceivably what -- for example, in  
7 Mr. LaPorte's case because of this evaporation it's  
8 this ink evaporation issue, is that what you're  
9 referring to?

10 MR. BOLAND: Yes, called a PE test,  
11 commonly is what I've learned in the last nine  
12 days.

13 THE COURT: I read about that. All right.  
14 Query, what would be gained by deposing Mr. LaPorte  
15 about that test?

16 MR. BOLAND: I'll give you an example.

17 THE COURT: How does your expert need --  
18 what would your expert need to know from  
19 Mr. LaPorte to enable your expert to say that it's  
20 an incompetent test. You already know it is.

21 MR. BOLAND: No, it's the reverse.

22 THE COURT: Presumably your expert knows  
23 it.

24 MR. BOLAND: That's their evidence. Their  
25 expert should tell us what is the basis for that

1 opinion. He has to support it.

2 THE COURT: He's given it to you. You say  
3 you know that it's incompetent. It's not -- it's  
4 not accepted. So your expert will be able to say  
5 under oath it's not accepted, and here's I why.  
6 What possible deposition testimony would you gain  
7 from Mr. LaPorte that you don't already know he  
8 based on the documentation that's before us as a  
9 matter of record?

10 MR. BOLAND: His credibility as a witness  
11 is in issue. And when he can't answer questions  
12 about the basic fundamentals that he claims  
13 underlie that test, that's something important for  
14 the Court to understand. These aren't two equal  
15 experts. It's somebody who is trying to pull the  
16 wool over the Court's eyes with this venire of  
17 science, and he needs to be held to account for  
18 that, explain it. And when he says, you know, I  
19 really don't know, and what we've already found in  
20 the short few days that we've been able to examine  
21 his report, and his -- the background on this test  
22 that he used, which, frankly, we're surprised the  
23 defendants are basing their case on it, is that he  
24 has in different depositions claimed that this test  
25 was reliable back starting 2002. In another case

1 he said well, it wasn't reliable until 2005. And  
2 in yet another case he said it wasn't reliable  
3 until 2008. His credibility is in issue. And that  
4 credibility can't be brought out.

5 THE COURT: So you suspect if you depose  
6 him, he'll stutter and stammer hem and haw and  
7 refuse to answer and can't answer, don't know, and  
8 so forth, and his credibility as an expert will be  
9 destroyed, and he'll have to go into some other  
10 line of work. Is that what you think is going to  
11 happen?

12 MR. BOLAND: I think he'll be exposed as  
13 trying to offer something on this Court that  
14 doesn't meet the standard under Daubert. And the  
15 Court can't rely on it in a motion to dismiss. And  
16 if we just submit our report, the Court doesn't  
17 know the full omissions that are in his report  
18 without him having to account for that.

19 And Lesnevich as well. He makes a conclusion  
20 that no one in his field makes. He should be  
21 required to support it.

22 THE COURT: How can you say that? Because  
23 you just told me you haven't had any other experts  
24 examine the documents on that very point.

25 MR. BOLAND: Our experts have been able to

1 read his report and say no one uses that analysis  
2 to conclude --

3 THE COURT: So it's not true that you're  
4 totally hamstrung here in terms of responding.  
5 Your experts have reviewed this voluminous  
6 document. You just said that.

7 MR. BOLAND: The handwriting -- the  
8 Lesnevich report's been reviewed, the LaPorte  
9 report has been red by them, yes.

10 THE COURT: Does that mean reviewed?

11 MR. BOLAND: I would say so.

12 THE COURT: Okay.

13 MR. BOLAND: And they're constantly coming  
14 up with new information every time they go through  
15 it that needs to be addressed by these witnesses.

16 THE COURT: Why wasn't any of that put in  
17 your papers?

18 MR. BOLAND: Because, your Honor, we've  
19 only had a few days to find out --

20 THE COURT: Well, yes, but, what, you just  
21 found out this morning or over the weekend after  
22 this was filed with the Court on Sunday?

23 MR. BOLAND: That -- that paper only  
24 addressed whether they're entitled to a delay or  
25 not. We're not prepared to argue the merits of the



1 motion to dismiss today.

2 THE COURT: I'm not. I'm trying to  
3 understand the potential merits, that's what I'm  
4 required to do, aren't I?

5 MR. BOLAND: Yes, your Honor, and the  
6 point we're making is you can't understand them  
7 until we get discovery necessary to every issue  
8 they've raised, and they raised issues beyond --

9 THE COURT: Oh, you --

10 MR. BOLAND: -- what they claim.

11 THE COURT: -- you certainly are going to  
12 have an opportunity to respond to the merits of the  
13 motion. I have to basically look under the covers  
14 and take a peek-a-boo at the strength of all of  
15 this material, which I have done. And what I'm  
16 listening to you say is that so have you. But  
17 interestingly none of what you're telling me now in  
18 oral argument is in any way alluded to in your  
19 papers.

20 MR. BOLAND: I understand that, your  
21 Honor, but there's a fundamental unfairness here  
22 for us to have the short period of time and try to  
23 cobble together a response to their nine months of  
24 work.

25 THE COURT: But you agreed to the

1 scheduling order.

2 MR. BOLAND: For the issue about deferring  
3 or delaying discovery, yes.

4 THE COURT: You agreed to the scheduling  
5 order for today's hearing. There was no request to  
6 adjourn today's hearing to give you more time to  
7 respond to their motion to stay discovery.

8 MR. BOLAND: On that issue --

9 THE COURT: Did you?

10 MR. BOLAND: No, we did not.

11 THE COURT: Well then, how can you now  
12 stand here and say that you're hobbled and you're  
13 being compromised in terms of your ability to  
14 respond?

15 MR. BOLAND: Because the basis you're  
16 using to analyze whether their motion is solid or  
17 not is essentially, please respond, Mr. Boland, to  
18 65 pages of a brief and 400 pages of exhibits, and  
19 do it now. That's what the discovery will be for  
20 is to show the Court that that document you have  
21 there, which looks -- which is half the story,  
22 looks so persuasive is going to look like every  
23 other case that goes to a jury, and there's going  
24 to be experts and evidence on every point that they  
25 make that the Court is currently persuaded by, and

1 we have not had a full opportunity to explore.

2 THE COURT: Because you're going to -- for  
3 example, as to the Work for Hire agreement you're  
4 going to put a document request out on  
5 Mr. Zuckerberg for a copy of that contract, is that  
6 it?

7 MR. BOLAND: We think Mr. Zuckerberg needs  
8 to come forward with the copy of the contract he  
9 has or --

10 THE COURT: He said he doesn't have any  
11 such contract under oath.

12 MR. BOLAND: He said he never --

13 THE COURT: Because he never signed such a  
14 thing.

15 MR. BOLAND: If you read his declaration,  
16 your Honor, he says I never signed an agreement  
17 involving Facebook. We want him to be deposed and  
18 explain what -- through discovery, did he sign the  
19 two-page document that is the authentic contract?  
20 Hand it to him with gloves on and ask him to say.  
21 He's never said that. They made a representation  
22 in their motion that he did. If you look at the  
23 reference, it's Mr. Snyder saying that he, you  
24 know, did or did not or we're not sure.  
25 Mr. Zuckerberg has to come in and say I didn't sign

1       it. So far -- and I'm talking about the specific  
2       document that my client's alleging is the actual  
3       contract.

4               THE COURT: Somehow I recall a declaration  
5       to the effect that what you purport -- what  
6       plaintiff purports is the actual contract, i.e. the  
7       Work for Hire contract was never signed by  
8       Mr. Zuckerberg. I don't know why I'm recalling  
9       that.

10              MR. SNYDER: You're correct, your Honor.

11              MR. BOLAND: My recollection of the  
12       declaration --

13              THE COURT: At my age, who knows. It's  
14       possible that I'm not as sharp as I should be.

15              MR. BOLAND: A clearer declaration would  
16       be an exhibit during a deposition where he is  
17       handed with gloves on the actual two-page document  
18       and says once and for all, I did not sign that  
19       page 2. That's not -- that is not the contract I  
20       signed. He has not done that yet. In fact, he has  
21       not even said that the -- under oath, that the  
22       document attached to the Kole email is the contract  
23       that he signed. They have offered no experts, no  
24       experts to declare that that document is the  
25       authentic document. That's an important omission

1 from their filing so far. No expert has said  
2 either that the StreetFax -- what they're calling  
3 the StreetFax contract is authentic. No expert  
4 said that. Or that Mr. Zuckerberg signed that  
5 document. No expert said that either.

6 THE COURT: Yeah, but there's an  
7 implication of that, and I tried to get at it  
8 earlier with regard to the contemporaneity of the  
9 undisputed execution of the spec by Mr. Zuckerberg  
10 with the contemporaneous timeframe that we're  
11 talking, as to the -- well, that's the issue at  
12 hand -- and the expert's opinion that that was  
13 signed contemporaneously, but the second page of  
14 the Work for Hire document wasn't signed  
15 contemporaneously.

16 MR. BOLAND: I'm not sure what expert  
17 report you're referring to with that. I don't  
18 recall that distinction.

19 THE COURT: That would be the Tytell  
20 declaration that I alluded to earlier.

21 MR. BOLAND: Our experts have previously  
22 already said --

23 THE COURT: So the point I'm making is --

24 MR. BOLAND: -- that the ink matches --

25 THE COURT: -- that it's not true that

1       there isn't some expert opinion about the concept  
2       that this StreetFax contract is the authentic  
3       contemporaneously executed contract between the  
4       parties, which is corroborated by the expert's  
5       comparison of the second page of that document with  
6       the sixth page of the specification that was dated  
7       and signed by Mr. Zuckerberg, presumably on the  
8       same date at the same time. So it's -- when you  
9       say there's no expert opinion authenticating the  
10      StreetFax contract as the true contract between the  
11      parties, I don't think that's correct.

12               MR. BOLAND: But their expert --

13               THE COURT: You get my point?

14               MR. BOLAND: Yes, your Honor. I don't  
15      recall that specific detail of Mr. Tytell's report.  
16      I read it already once, and I've read all of them  
17      once, but it's a lot of material, as the Court  
18      knows. But be that as it may --

19               THE COURT: That's a pretty decisive  
20      point. I don't know why I'm interested. I'm  
21      apparently the only one in the courtroom that's  
22      interested in it.

23               MR. BOLAND: Because it's a --

24               THE COURT: No one else is interested.  
25      Just like I was interested in the hex editor.

1 MR. BOLAND: It's flawed science comparing  
2 a piece of paper and a digital image. That's the  
3 problem with it. The guys in Tytell's industry in  
4 his field, as our experts will come to tell you,  
5 don't do that. They are doing all kinds of things  
6 in this case that they've never done.

7 THE COURT: Tytell didn't have the  
8 original of the spec?

9 MR. BOLAND: No, he's comparing the  
10 original of the spec with a digital image of what  
11 they call is the real contract is what you just  
12 laid out. The experts don't do that and say that  
13 the digital image is real. They might say the  
14 original --

15 THE COURT: We don't have the original of  
16 the StreetFax contract, is that right?

17 MR. BOLAND: No. And if Mr. Zuckerberg  
18 who claims that's the real contract had that  
19 document, which he so far concealed from the Court,  
20 because he's never given a statement like  
21 Mr. Ceglia was required. Where is it? If you  
22 don't have it, what did you do with it? When did  
23 you do that with that? How hard have you looked  
24 for it? Mr. Ceglia was required to do all that  
25 regarding some USB drives which the defendants have

1 no evidence have anything relevant to this case.

2 This document is completely at the heart of  
3 this case, and if it were true, the case would be  
4 over. So it's very interesting that they don't  
5 come forward with an explanation of where that  
6 document is, except Mr. Snyder, who is not a  
7 witness and not under oath, spouting about how 18  
8 year Olds leaving college throw their papers aside,  
9 which may or may not be an interesting fact about  
10 college students. That's not Mr. Zuckerberg saying  
11 here's what I did with it, here's how hard I looked  
12 for of it, and I don't have it. And you even  
13 alluded to that, your Honor, at a prior hearing  
14 saying did he check his parents attic? Who knows.  
15 But that document is missing. And it was missing  
16 at a time when he and Ceglia, according to the  
17 defendants had a legal dispute going.

18 THE COURT: That assumes there was a  
19 duplicate copy.

20 MR. BOLAND: Mr. Zuckerberg has admitted  
21 he received a copy of the document.

22 THE COURT: A duplicate original I should  
23 say.

24 MR. BOLAND: Yes. He's admitted he  
25 received a copy of that document that he signed on



1       that date. He has admitted that.

2               THE COURT: A copy, but the original then  
3 per force that implies that Mr. Ceglia had the  
4 original.

5               MR. BOLAND: There might have been two  
6 originals signed by both of them. I don't know the  
7 detail on that. That's one thing that hasn't come  
8 out in either of our papers. I'll find that out  
9 for you.

10              But nonetheless, your Honor, that document was  
11 subject to litigation at the time that  
12 Mr. Zuckerberg disposed of it, if he even disposed  
13 of it when he was 18 or 19 leaving Harvard. So  
14 there's an issue there under Second Circuit case  
15 law with regard to whether that counts as  
16 spoliation of that document. Because there was an  
17 ongoing legal dispute between him and Mr. Ceglia  
18 over the StreetFax payments, et cetera, and that is  
19 one of the concerns that we have. That he's  
20 allowed to destroy, discard, and say dog ate my  
21 homework on the key document in this case, and then  
22 attempt with these experts and weasel words to  
23 shoot from the weeds that an original we have which  
24 you can look at and everyone in this room, with  
25 gloves on, can take a look at.

1           And it's -- these experts are purporting to do  
2           something monumental that's never been done, and  
3           that is try to persuade the Court that a real piece  
4           of paper that experts have looked at and are  
5           disputing, I'll agree with that. Their experts are  
6           now disputing what ours say about the authenticity  
7           of it. This one's fraudulent because we found a  
8           digital image somewhere that nobody knows how it  
9           got there, nobody knows whether it was scanned or  
10          not, nobody knows it's providence whatsoever. But  
11          trust us, your Honor, that digital image is the  
12          real one, and this thing right in front of you,  
13          that's a fake even though the experts disagree on  
14          whether it is. And that's the basis of their fraud  
15          (indiscernible).

16                 THE COURT: Would you agree that if there  
17                 was an electronic version of the Work for Hire  
18                 contract, an electronic version of it created by  
19                 not Mr. Zuckerberg, but by your client, and it  
20                 would seem that he was the author of these  
21                 documents -- of that document, correct?

22                 MR. BOLAND: Yes, your Honor, there are  
23                 those documents. They exist.

24                 THE COURT: There is an electronic version  
25                 of the Work for Hire contract in your client's

1 possession on one of his computers?

2 MR. BOLAND: Yes. Let me clarify.

3 There's not --

4 THE COURT: Yes?

5 MR. BOLAND: There's not one signed.

6 There's not one signed. There's the Word documents  
7 that he used to eventually printout and have  
8 Mr. Zuckerberg sign. They talked about those in  
9 Stroz Friedberg's report claiming backdating on  
10 those documents.

11 THE COURT: The so-called test forgeries?

12 MR. BOLAND: Yes, that's their claim of  
13 that. But let me talk to you about that, your  
14 Honor, because this backdating issue is again a red  
15 herring. I just mentioned earlier, I had to use a  
16 hex editor myself a week ago, and I'll tell you  
17 why. Because I'm downloading documents from this  
18 case off of ECF, I'm getting productions from their  
19 experts, and I'm getting other files from prior  
20 counsel, and all of a sudden my computer won't  
21 synchronize them. And guess what I found out, your  
22 Honor? A bunch of those documents when they landed  
23 on my computer have creation dates of 2004 and  
24 1969, predating the development of an iPad or  
25 anything else.

1           So something went haywire with the programs on  
2           my machine and started redoing create dates to my  
3           files. I'm not backdating my computer. Stuff  
4           happens on computers. And what Stroz Friedberg  
5           wants you to believe is there's a book somewhere  
6           with every possible way a file can be backdated,  
7           and we've checked off every one. And you know what  
8           one's left? Forgery, that's it. Nefarious. But  
9           that's false. And they know it's false.

10           They know that there are so many variables on  
11           computers, especially a computer they never had  
12           access to as it operates, there's no way they can  
13           say the only way these got backdated is some evil  
14           intent by the person operating that program.  
15           That's just patently false. I had backdated  
16           documents that I used a hex editor to fix so I  
17           could have them on my iPad here today. And any  
18           legitimate expert would have pointed that out.  
19           Just like portions of the report -- I want to point  
20           out one other thing, your Honor, that goes to the  
21           credibility of Stroz Friedberg and why, when you  
22           say avalanche of data, it might be an avalanche,  
23           but it's full of a bunch of rocks and wood and all  
24           kinds of things that are injurious.

25           For example, on page 15 of their report -- this

1 is the difference between reading the details which  
2 we are all doing and some perhaps in the media or  
3 defense counsel want to highlight just look at that  
4 header, your Honor, under capital A, the StreetFax  
5 contract was found on two different Ceglia hard  
6 drives. Now if you stop there, you're thinking,  
7 wow, Paul had two computers and these contracts  
8 were found on it. But what's the reality? In the  
9 paragraph they totally change that 180 degrees.  
10 Guess what the two hard drives are, your Honor?  
11 One hard drive produced by Mr. Ceglia, actually his  
12 parent's hard dive, which they neglect to mention,  
13 and a forensic copy of that hard drive.

14 So this is the misleading nature of this  
15 report. And these are only some of the things that  
16 we found in this short time looking at the report,  
17 and there's plenty more to be found. These  
18 conclusions are exaggerated. Some have, as I  
19 mentioned before, these words like "presumably",  
20 "it's likely", "we can't think of another reason".  
21 Well, they can't think of another reason because  
22 they're advocates, they're not experts. This is  
23 not a legitimate expert report, which advocates --

24 THE COURT: Your experts are experts, not  
25 advocates?

1 MR. BOLAND: They're not. They're going  
2 to call it like they see it. That's the only  
3 experts I've ever dealt with. I've had experts  
4 tell me before, you know what, Mr. Boland, I've got  
5 bad news for you and your client. I got good news  
6 for you and your client. I have no news. I don't  
7 know what happened. Experts who do advocacy like  
8 is replete in this report --

9 THE COURT: Hired guns.

10 MR. BOLAND: -- that's an issue of  
11 credibility.

12 THE COURT: Hired guns.

13 MR. BOLAND: I don't know if you call them  
14 hired guns, but they're former prosecutor working  
15 with a former prosecutor, and this is a piece of  
16 advocacy. It's basically a lawyer's document to  
17 further argue the case, because when you say  
18 there's no way these things can be backdated except  
19 forgery or some nefarious tasks, and you know for a  
20 fact that things like I just described to you  
21 happen everyday with people's computers, you're  
22 being an advocate. You're not telling the truth.  
23 You're misleading and omitting things.

24 Just like when Mr. Snyder stood up, I don't  
25 know an hour or so ago, and tried to make you

1 believe that Mr. Ceglia had sent emails from that  
2 Get Zuch email account and then deleted them. It's  
3 false. Stroz Friedberg says right in their report  
4 not a single thing about an email out of that  
5 account. And you know what the January 28th  
6 reference is to? That's an email Mr. Ceglia was  
7 required to send from the account to Google's legal  
8 department, because that's what was required for  
9 the consent, so that the legal department could  
10 grab the contents of the account that he never used  
11 and gave it to them. Now they don't believe they  
12 never used it.

13 THE COURT: Are you talking about the  
14 deleted account?

15 MR. BOLAND: There's not a deleted  
16 account, your Honor.

17 THE COURT: There's not. They were  
18 misinformed by Google that it was deleted?

19 MR. BOLAND: Google did not tell them it  
20 was deleted. Stroz Friedberg is misleading you --  
21 actually not Stroz Friedberg. Stroz Friedberg is  
22 kind of using some weasel words that there may have  
23 been emails.

24 THE COURT: Well, was the account deleted  
25 or not?

1 MR. BOLAND: No. The account was there,  
2 live.

3 THE COURT: Can we get a copy of it then?

4 MR. BOLAND: They have a copy. He never  
5 used it. Your Honor, I can set up an email account  
6 and never send an email. There's none wrong with  
7 it.

8 THE COURT: Why would you do a thing like  
9 that?

10 MR. BOLAND: That's something to figure  
11 out down the road. I have no idea why.

12 THE COURT: You don't do that.

13 MR. BOLAND: Pardon me?

14 THE COURT: You don't do that.

15 MR. BOLAND: No, I use my emails accounts  
16 to send emails back and forth.

17 THE COURT: Sure.

18 MR. BOLAND: My point is, Mr. Ceglia had  
19 up to now we have eight or nine email accounts.  
20 Another factor where Mr. Snyder says he lied to  
21 you, he concealed. He has up to eight email  
22 accounts that he had in the past, including two  
23 that their clients set up for him back in '03 and  
24 '04 that Mr. Ceglia didn't remember. It's  
25 legitimate that they didn't remember them since



1       their client didn't remember them, and he's the one  
2       who set them up for him.

3               THE COURT:   And they never told him that  
4       they had set them up, is that what you're saying?

5               MR. BOLAND:   I'm not saying what  
6       communication there was.   But if their client set  
7       up the email and my client was supposed to use it,  
8       the fact that my client didn't remember it means  
9       it's concealed?

10              THE COURT:   Zuckerberg set up email  
11       accounts for Mr. Ceglia --

12              MR. BOLAND:   Yes.

13              THE COURT:   -- as part of the StreetFax  
14       project?

15              MR. BOLAND:   Yes.   And it was in  
16       Mr. Ceglia's declaration.   I don't remember which  
17       one recently.   But we told them that.   We said, oh,  
18       by the way, there's additional email accounts I may  
19       have used, but Mr. Zuckerberg set them up for me.  
20       You'd have to talk to him about who the hosting  
21       company was that he put them with.   So, they didn't  
22       mention those.   Were they concealing those?   Of  
23       course they weren't.   Mr. Zuckerberg didn't  
24       remember doing that, I presume, back in '03.   I'll  
25       give the guy the benefit of the doubt.

1 But when it comes to Mr. Ceglia, he's over  
2 there huddled around all this information, you  
3 know, that he knows about, and he's not giving it  
4 to the Court. Well, it's kind of interesting how  
5 the same factual scenario they paint a different  
6 way.

7 THE COURT: So all of these analyses by  
8 Stroz Friedberg about the fabrication of the  
9 purported Zuckerberg-Ceglia emails going back  
10 to 2003 are -- we should discard -- I mean, I  
11 should be unpersuaded by them.

12 MR. BOLAND: No, the analysis --

13 THE COURT: For example, I remember one of  
14 them -- one of the points they made was that one of  
15 the purported email communications that your client  
16 allegedly, I don't know, downloaded or copied to  
17 some sort of floppy was a communication between  
18 Zuckerberg and Ceglia about the startup of the  
19 Facebook website.

20 MR. BOLAND: Right.

21 THE COURT: And according to the email  
22 which Mr. Ceglia has said is authentic, Zuckerberg  
23 said well we just went -- we just started up the  
24 website.

25 MR. BOLAND: Right.

1           THE COURT: And Zuckerberg says to him  
2 well, come and look at it. And of course the date  
3 and the time show that it was operational in the  
4 morning of some date, when history has recorded  
5 that it was operational in the afternoon. And  
6 Ceglia not being a Harvard student would never had  
7 access to it. So that email is authentic?

8           MR. BOLAND: Well, your Honor, you just  
9 added in two pieces of information that are not in  
10 the record under any declaration, that that Harvard  
11 server was live at a particular time and date.  
12 There's no documentation from an expert, but more  
13 importantly, Mr. Zuckerberg saying I'm going to say  
14 under oath this is the date and time I did it.  
15 They referenced a newspaper article which says  
16 well, the server went live at this time. But what  
17 about what Mr. Zuckerberg has to say about I let a  
18 bunch of people, which everyone knows is done with  
19 a new software service. You just don't roll it out  
20 there and say I hope it works. You have tons of  
21 beta testers they call him. His friends, Eduardo  
22 Saverin, Dustin Moskovitz, the other individuals  
23 who testified under oath in the ConnectU case and  
24 the Saverin case which are other records that we  
25 need to access for this issue which they've raised.

1 When did Facebook go live? They raised the issue  
2 as a fact.

3 Well, we're entitled to discovery. And there's  
4 discoverable information in both those cases. In  
5 addition, there would be discoverable information  
6 on the computers Mr. Zuckerberg used at that time  
7 to run the Facebook server out of his dorm room.  
8 And we know where those computers are. There's no  
9 cost or burden issue here. Those are preserved  
10 allegedly and their originals are.

11 THE COURT: I know I'm jumping around a  
12 little bit. I apologize for that. You're -- very  
13 interested in your comments. I forgot which expert  
14 it was that commented on the difference in the  
15 toner application between page 1 of the purported  
16 Work for Hire --

17 MR. BOLAND: Yes, your Honor.

18 THE COURT: -- and page 2.

19 MR. BOLAND: Yes. Here's just one of the  
20 problem with that.

21 THE COURT: Page 2 opinion is that the  
22 type of toner and application that was used was not  
23 available in 2003.

24 MR. BOLAND: And they're merely rebutting  
25 our expert who has already said he has an entire

1 library of toners, and he put it to a specific  
2 printer from that time. It was only available  
3 from 2000 to 2005. So their expert says that's  
4 wrong.

5 Well, our expert has already declared, I can  
6 tell you it's right. I have the library of ink  
7 standards or toner standards from them, and that's  
8 when it's from. That's dueling experts, your  
9 Honor. That's not sufficient for any of this that  
10 they put out.

11 So I think you can see in just the few days  
12 I've had to confer with experts, review these  
13 documents, confer with the other lawyers, legal  
14 research.

15 THE COURT: I can't recall which expert,  
16 you're talking about Aginsky maybe or which expert  
17 is it that offered the opinion about the  
18 commonality of the toners?

19 MR. BOLAND: From our side?

20 THE COURT: Yes.

21 MR. BOLAND: The expert was Larry Stewart  
22 in a declaration he filed. I don't recall the  
23 document number off the top of my head. But he  
24 specifically outlined his analysis of the toner,  
25 and he didn't just, well, it's the same. He gave

1       them make and model of the printer that used that  
2       toner and when it was manufactured.

3               THE COURT:   Would -- I forget which expert  
4       it is on the defendants' side that commented on the  
5       difference in the font between page 1 of the Work  
6       for Hire instrument which is at issue here and  
7       page 2.

8               MR. BOLAND:   Mr. Romano.

9               THE COURT:   Professor Romano perhaps?

10              MR. BOLAND:   I don't know if he's a  
11       professor or not.

12              THE COURT:   He's the head of the  
13       something.

14              MR. SOUTHWELL:   Professor at RIT.

15              THE COURT:   At RIT.   He certainly doesn't  
16       sound like a hired gun, but beside that, he in his  
17       opinion said that the first page that the Work for  
18       Hire so- called contract is in New Roman, the  
19       second page in is Garamond.   The StreetFax contract  
20       which the defendants claim is the -- is the actual  
21       contract both pages are in Garamond.   Do you recall  
22       that?

23              MR. BOLAND:   You already responded to  
24       this, your Honor, in a prior hearing on the record  
25       where you said to the defendants well, when people

1 put together documents from multiple sources, which  
2 has been my client's declaration in this case,  
3 copy, paste, copy, paste, let's make a document,  
4 these are exactly the kind of differences you find.  
5 Moreover, your own staff could tell you that when  
6 they save and open and import Word documents, it is  
7 a common feature of doing that that fonts get  
8 changed, and you're in a middle of the document,  
9 and all of a sudden the font's different.  
10 Microsoft Word does that all the time. There's no  
11 nefarious behavior.

12 THE COURT: But Professor Romano says the  
13 whole page was New Roman and the second page was  
14 Garamond.

15 MR. BOLAND: The same response, your  
16 Honor. The difference in fonts --

17 THE COURT: I mean, if it's a document  
18 that was signed authentically and honestly on a  
19 certain date of 2003, you're saying that when  
20 Mr. Ceglia created the document he used different  
21 fonts for the first page, i.e., New Roman, but used  
22 Garamond for the second?

23 MR. BOLAND: Well --

24 THE COURT: Does that make sense?

25 MR. BOLAND: Let's assume that analysis by

1 Mr. Romano is correct. He also says in his report  
2 that these are incredibly similar, but slightly  
3 different fonts. So that's important, your Honor.  
4 Visually this document to a non-professor at RIT is  
5 not going to look like it's written in some kind of  
6 child-like font, and on the back page it's in some  
7 kind of script. They're two very similar but  
8 slightly different fonts. He even had to zoom in  
9 on the fonts in his report to show --

10 THE COURT: That's what he's paid to do.

11 MR. BOLAND: I understand.

12 THE COURT: I mean that's exactly how you  
13 go about detecting fraud.

14 MR. BOLAND: But Mr. Ceglia is not --

15 THE COURT: Get down to the details.

16 MR. BOLAND: I understand that. But  
17 Mr. Ceglia printed a two-page document. They're  
18 both very similar, he went -- let's go to Boston to  
19 have signed. There was nothing that would indicate  
20 he had made a mistake and cobbled together  
21 something that created a different font on a page.  
22 Again --

23 THE COURT: It is curious though that  
24 Garamond style is -- is apparently according to  
25 Professor Romano, the same for the StreetFax



1 document which defendants believe to be the true  
2 document.

3 MR. BOLAND: Well, that may or may not be  
4 the case, and I'll tell you why. The StreetFax  
5 document is of such poor quality, it's hard to even  
6 view it. The one that's attached to the Kole email  
7 is very difficult to view. So how he can  
8 conclude --

9 THE COURT: I think the defendants took  
10 the trouble to transpose it under oath I think did  
11 they not?

12 MR. BOLAND: But they didn't transpose it  
13 claiming they had the right font. They just  
14 transposed the content of it.

15 THE COURT: Well, that's the point.

16 MR. BOLAND: But I'm saying to view it  
17 visually and say that's all Garamond font, who  
18 knows what our expert who now -- that was never an  
19 argument they made before. It's new in these  
20 series of documents.

21 THE COURT: That's why I raised it.

22 MR. BOLAND: Yes. And there's many others  
23 that I certainly --

24 THE COURT: It sounds to me like you have  
25 a good possibility of countering the motion to

1 dismiss with contrary expert opinion that would  
2 demonstrate the authenticity of the Work for Hire  
3 document.

4 MR. BOLAND: There's part of it we can  
5 counter with expert opinion. But there's other of  
6 it that we have to actually depose their experts  
7 and get them to declare how they arrived at certain  
8 conclusions, because, frankly, our experts are  
9 looking at the report and saying I don't know how  
10 he gets there, because they're just so wildly  
11 outside of what the field does.

12 THE COURT: Which experts were those?

13 MR. BOLAND: LaPorte.

14 THE COURT: No, no --

15 MR. BOLAND: Lesnevich.

16 THE COURT: -- which experts have already  
17 reviewed this document since it was filed on March  
18 26th and told you what you just said.

19 MR. BOLAND: They reviewed portions of it.

20 THE COURT: Who?

21 MR. BOLAND: Larry Stewart, Jim Blanco.

22 THE COURT: Anybody else?

23 MR. BOLAND: And we've had -- may I have a  
24 moment your Honor to ask Mr. Dumain a question?

25 THE COURT: Sure.

1 (Off the record discussion.)

2 MR. BOLAND: Your Honor, there's one other  
3 expert we've had review Stroz Friedberg's report,  
4 not in total, but have gone over it to try to find  
5 some of the conclusions, that's Silent is the name  
6 of the company that's already been involved in this  
7 case. They have imaged some media a long time ago.  
8 And then there's one other expert we haven't yet  
9 disclosed. It's purely a consulting expert that  
10 has evaluated it. So we will be disclosing them at  
11 some point if we intend to use them.

12 But my point is, your Honor, that's just the  
13 experts. There's more in this motion than just  
14 experts. You just pointed out when did Facebook  
15 start? Mr. Zuckerberg has never declared what  
16 document he signed or didn't sign under oath. Is  
17 it the StreetFax digital image that he signed, and  
18 is he going to declare that he didn't sign the  
19 contract that he has with my client? He has now  
20 put that that issue --

21 THE COURT: If that is -- if there's a  
22 hiatus or a lacuna in the record regarding Mr.  
23 Mr. Zuckerberg's personal knowledge of when the  
24 Facebook website became operational, that can be  
25 easily cured by a supplemental declaration. We

1 don't need a deposition, do we?

2 MR. BOLAND: Yes, we do --

3 THE COURT: Why?

4 MR. BOLAND: -- because we have a right to  
5 get all these things under oath, not only these  
6 issues here --

7 THE COURT: Well, if it comes in a  
8 declaration under oath, what's wrong -- that's a  
9 simple fact, isn't it?

10 MR. BOLAND: That is, your Honor. But  
11 there's wider facts than that. They have based  
12 their motion to dismiss --

13 THE COURT: That's one thing, we don't  
14 need to depose Zuckerberg on that issue.

15 MR. BOLAND: We don't, but there's no need  
16 to get a declaration from him on it either, because  
17 there's a ton of stuff that he has to be deposed  
18 on. The emails to begin with. Where are all the  
19 computers he used in 2003 and 2004? They've made  
20 claims that these emails between him and my client  
21 don't exist. Mr. Zuckerberg needs to declare what  
22 computers he used during that time to interact with  
23 the Harvard server. And we have to analyze the  
24 Harvard server to determine if that's even true.

25 THE COURT: Excuse me, how could that

1 possibly bear on the competency of the expert  
2 opinions which tend to suggest, which is I think an  
3 understatement, that the Work for Hire document is  
4 a fake?

5 MR. BOLAND: I'm -- I'm not talking about  
6 the experts at this point.

7 THE COURT: Well, I am.

8 MR. BOLAND: I'm saying beyond just the  
9 experts. Well, okay.

10 THE COURT: I want to know how knowing  
11 about all of Zuckerberg's computers would in any  
12 way implicate and undermine the expert opinions  
13 that are elaborated in this document?

14 MR. BOLAND: Your Honor, because we're  
15 entitled to challenge Stroz Friedberg's conclusions  
16 which are completely subjective and in dispute  
17 about how these anomalies as they call it arrive on  
18 Paul Ceglia's parent's computer and in these  
19 emails. And it is not without a good-faith basis  
20 to the following facts which are known.

21 Mr. Zuckerberg was disciplined at Harvard for  
22 gaining unauthorized access to Harvard computers.  
23 That's known. Although the record's sealed, and  
24 once we get into that record, we'll know precisely  
25 what he admitted to doing.

1 THE COURT: What does that have to do with  
2 the competency of Stroz Friedberg's analyses.

3 MR. BOLAND: Because their analyses fails  
4 to look at could that computer have been  
5 compromised. What about their own emails that they  
6 produced --

7 THE COURT: Which computer?

8 MR. BOLAND: The computer on which that  
9 evidence was found. There's no talk about, hey, we  
10 confirmed that there was no -- no individual got  
11 access to that computer in any unauthorized way  
12 through viruses or through anything that would  
13 indicate hacking. Not Mr. Zuckerberg, any person,  
14 someone on his behalf, some -- whoever.

15 THE COURT: I'm talking about the emails  
16 that are attached to the amended complaint which  
17 tend to corroborate the theory of the plaintiff  
18 that there's a contract relative to ownership of  
19 Facebook, correct?

20 MR. BOLAND: Yes.

21 THE COURT: Okay. So, the question is, in  
22 the absence of hard copy of the emails which your  
23 client claims he received or -- and/or sent to  
24 Zuckerberg which are attached to the amended  
25 complaint, he somehow managed to recreate the text

1 on a floppy disk using a word processor, correct?

2 MR. BOLAND: I don't think so. I think he  
3 copied them directly to that device is what  
4 happened.

5 THE COURT: Right.

6 MR. BOLAND: From what I remember from his  
7 declaration.

8 THE COURT: He copied them somehow, right,  
9 to the floppy, right?

10 MR. BOLAND: Yes.

11 THE COURT: Stroz Friedberg has pointed  
12 out numerous indications that suggest that those  
13 emails are fabrications, have they not?

14 MR. BOLAND: I wouldn't say numerous.  
15 There's three or four.

16 THE COURT: Yes.

17 MR. BOLAND: But they haven't explained  
18 how the server --

19 THE COURT: How would knowing where  
20 Mr. Zuckerberg's computers at Harvard are located  
21 or how many there were of them in any way, shape,  
22 or form allow you to refute the accuracy of Stroz  
23 Friedberg's analysis?

24 MR. BOLAND: Because if these Harvard --  
25 these emails end up on the Harvard server,

1       somewhere Stroz Friedberg hasn't looked, because  
2       they took a biased analysis, that would disprove --

3               THE COURT: That's a different point than  
4       the point you just made.

5               MR. BOLAND: -- the entirety of it.

6               THE COURT: You said you need to know  
7       where all the computers are. Now you're accusing  
8       Harvard of having an incompetently operated server.

9               MR. BOLAND: No.

10              THE COURT: Yes, you are.

11              MR. BOLAND: Let me be clear.

12              THE COURT: Yes, you are.

13              MR. BOLAND: Stroz Friedberg did not  
14       look --

15              THE COURT: Yes, they did. They received  
16       copies, according to Harvard, of all -- they did a  
17       dump of all the information on Zuckerberg's account  
18       in the Harvard servers, found nothing that  
19       pertained to Facebook.

20              MR. BOLAND: And here's what they didn't  
21       get, backup tapes of that server to compare to what  
22       was available on that server when Harvard gave it  
23       to them. There could be a difference there. In  
24       addition, they didn't get any data --

25              THE COURT: Why is that not in your



1 papers? I mean, it seems, Mr. Boland, that you  
2 kind of sort of like Tennyson's brook here, it just  
3 kind of keeps on flowing, you know. I mean, are  
4 you suggesting that the information that Stroz  
5 Friedberg received from the Harvard people was  
6 somehow manipulated?

7 MR. BOLAND: No, it was incomplete.

8 THE COURT: How do you know that?

9 MR. BOLAND: Because --

10 THE COURT: Did your experts tell you  
11 that?

12 MR. BOLAND: Stroz Friedberg has told us  
13 what they received, and it didn't include backup  
14 tapes of those servers. It didn't include any  
15 information about what devices Mr. Zuckerberg used  
16 to connect to his email in 2003 and 2004, like a  
17 laptop, where he could very easily, Stroz will tell  
18 you, save emails to a laptop that are no longer on  
19 the server. We don't know that. Harvard didn't  
20 tell us that. Why? Because Stroz didn't ask for  
21 that, because it doesn't help their client's case.

22 THE COURT: So you're looking for  
23 Zuckerberg laptops in 2003.

24 MR. BOLAND: Well, we know where the  
25 laptops are. We're looking to see if those laptops

1 connected to the Harvard server and then obviously  
2 would have emails on them, copies of emails that  
3 would be discoverable to compare.

4 THE COURT: Wouldn't necessarily  
5 technically the emails have to be lodged on the  
6 Harvard server if they were connected?

7 MR. BOLAND: No.

8 THE COURT: No?

9 MR. BOLAND: And your assistant --

10 THE COURT: Why would you be connected to  
11 the server?

12 MR. BOLAND: You can connect with a laptop  
13 to a server, and you can send emails from the  
14 server. You can download them from your laptop and  
15 then execute a command to delete them off the  
16 server.

17 THE COURT: And the server never remembers  
18 the emails?

19 MR. BOLAND: Servers turn over so fast,  
20 they overwrite those parts of the hard drive. It  
21 can be gone within days.

22 THE COURT: But the backup would pick it  
23 up?

24 MR. BOLAND: There is a backup tape that  
25 has to be looked at. It might pick it up.

1           THE COURT: So -- so Stroz Friedberg as to  
2 this issue were not competent experts because they  
3 did not request the backup tapes for that period of  
4 time relative to Zuckerberg's account?

5           MR. BOLAND: I wouldn't use the word  
6 competent. I would say they're biased. They  
7 purposely didn't look where there could be  
8 information that would hurt their client. Just  
9 like they didn't examine the computers that Parmet  
10 currently has in its possession. Why would they  
11 bother to examine those, your Honor? Because it  
12 could potentially have evidence discoverable in  
13 this case.

14          THE COURT: Who was that again, Parmet?

15          MR. BOLAND: We talked about these earlier  
16 in the case. These are several computers that  
17 Mr. Zuckerberg has admitted using in 2003, 2004,  
18 for both electronic communication, email and  
19 texting.

20          THE COURT: The name rings a bell, but I  
21 can't remember exactly what it was.

22          MR. BOLAND: Parmet is a computer forensic  
23 firm that has possession of what are claimed to be  
24 copies of Zuckerberg's computers from the time when  
25 he started Facebook in his dorm room, including,

1       your Honor, what they claim is the laptop that was  
2       used as the original server to run Facebook. And  
3       guess what information that will have? When  
4       Facebook weren't live, and who was a beta tester  
5       and could see Facebook, and could college kids --  
6       I'm sorry, could people outside of college get  
7       access to that laptop? That laptop has that  
8       evidence, and Stroz Friedberg ignored it. They did  
9       this multi-page report.

10               THE COURT: How do you know there is such  
11       a laptop?

12               MR. BOLAND: Because the defendants have  
13       said already on the record that that -- in fact, we  
14       had a conference about this on the day before  
15       Thanksgiving. Mr. Snyder said I know all about  
16       those computers. Mr. Zuckerberg used them when he  
17       was a freshman at Harvard. And they were --

18               THE COURT: That included -- I don't  
19       remember any reference to a laptop. I guess I  
20       should have, but I didn't.

21               MR. BOLAND: Multiple laptops and loose  
22       hard drives that are still preserved, so there's no  
23       cost or burden to producing them for our expert to  
24       evaluate. And those could have information. It's  
25       a perfect example, your Honor. What if there's a

1 single email on one of those laptops which are  
2 entirely discoverable under the Court's discretion  
3 that say I got this guy in New York that gave me  
4 \$2,000, but I'm going to tear up the contract, I'm  
5 not paying him. Guess what? Everything in that --  
6 that you see in that document right there just blew  
7 up. One email.

8 And what they're not looking at with their  
9 experts is what's there. And the question is, why  
10 aren't they looking at it, and why doesn't  
11 Mr. Zuckerberg come forward with his contract, or  
12 explain where it is? And I think there's reasons  
13 for that, and we're entitled with a good-faith  
14 inference to say we need to discover that. It's  
15 not going to hurt them. It's no burden on them at  
16 all. It's already been produced.

17 And you're looking at what you say is an  
18 avalanche, and it's persuasive, and I've just  
19 demonstrated to you a single email could change  
20 that from persuasive to a losing case for them,  
21 which it is, because the contract is valid. And  
22 they're using this digital mumbo-jumbo to try to  
23 get rid of an actual paper document.

24 And there's absolutely no support for the  
25 notion that you can take an original document --

1 and the rules regard what we have as an original --  
2 and come up with some copy. Because the digital  
3 image they're talking about is not an original, and  
4 say that digital copy overcomes the original.  
5 Sorry, your original loses. No. 1008, as the  
6 Court asked us to brief, says otherwise. Well,  
7 asked us to consider. Let me be clear.

8 THE COURT: Yeah.

9 MR. BOLAND: And we did brief. All the  
10 case law in there says otherwise. They're  
11 challenging the authenticity of this document.  
12 1008 says judges back off and juries step in.

13 THE COURT: In other words, there's no  
14 inherent power to dismiss based on fraud where the  
15 underlying dispute is over the allegedly fraudulent  
16 contract. There just no power. The Court is -- is  
17 forbidden, if you will, or disempowered from acting  
18 on a request to dismiss based on fraud where the  
19 fraud inheres in the contract that is at dispute.  
20 That's what you're thinking?

21 MR. BOLAND: Yes, your Honor. Because  
22 admissibility, as you point out at the last  
23 hearing, is weight.

24 THE COURT: That's my concern too when I  
25 asked you to look at the issue. But you haven't

1 provided any authority that says so.

2 MR. BOLAND: In the brief that we provided  
3 had every federal case which has dealt with  
4 Rule 1008, and they all clearly say -- they don't  
5 qualify it. They don't say, well, if you challenge  
6 it with a lot of experts, now the judge can step  
7 in. It doesn't say that. They want you to extend  
8 it to that. They want you to extend it to 1008  
9 means, if you challenge the authenticity but with a  
10 really big stack of paper, now the judge can take  
11 it out of the jury's hands. That's the case law --  
12 that's the order they want you to write. That's  
13 the law they want you to establish.

14 THE COURT: Well, I mean it is a clear and  
15 convincing standard that we have to apply, correct?

16 MR. BOLAND: It is, and we are entitled,  
17 in fairness, to rebut the clear and convincing  
18 standard with as wide a discovery as necessary to  
19 go at every issue they raised. That's why deposing  
20 Mr. Zuckerberg is critical. He has to say under  
21 oath answers to all this. Again, imagine he says  
22 under oath, here's the date and time Facebook went  
23 live. But his computers held by Parmet say no, no,  
24 it went live two weeks earlier. That's a  
25 credibility issue which we wouldn't want the Court

1 to rely on some news report as opposed to the  
2 comparison of an individual who has admitted  
3 committing forgeries and frauds himself,  
4 Zuckerberg, with regard to this company and its  
5 business records under oath. That's the person  
6 we're talking about.

7 And so it is not defamatory for me to say I'm a  
8 little concerned that Mr. Zuckerberg's statement  
9 about when he started Facebook might not be  
10 accurate perhaps from his memory or perhaps for  
11 some other reason, but the computers will tell us  
12 everything that was going on then. Does he have  
13 emails there? Computers will tell us. When did  
14 Facebook go live? The computers will tell us.

15 THE COURT: You're talking about the  
16 computers in the other -- in the Boston lawsuit  
17 that you didn't know about before.

18 MR. BOLAND: Yes, sir, because they're  
19 arguing --

20 THE COURT: I understand.

21 MR. BOLAND: -- the emails that my client  
22 sent in both '03 couldn't have been sent. Well,  
23 we'll know for sure once we look there now we,  
24 won't we? We'll have a better clue.

25 THE COURT: You'll want those downloaded



1 by your experts as they -- you want access to those  
2 computers under the protocol that we have?

3 MR. BOLAND: Yes, your Honor. I think the  
4 Court would agree that's fair. They had their  
5 protocol. It worked very well. They didn't  
6 disagree with it when it was entered into. And you  
7 just have to flip the parties.

8 THE COURT: They preserved them. I think  
9 there are four computers involved, is that what I  
10 recall?

11 MR. BOLAND: The Parmet computers?

12 THE COURT: Right.

13 MR. BOLAND: I think it's four related to  
14 Mr. Zuckerberg, but there's two or three others  
15 related to other founders which also could have  
16 discoverable information on them, communications  
17 between them. But it's not just that, your Honor.  
18 It's the depositions -- I'm sorry, the now sealed  
19 information in the other two cases. There's  
20 deposition testimony and guess what it's about?  
21 When was Facebook founded, who founded it, who was  
22 involved, who gave money. Those are all the  
23 central issues to this case that are now hidden  
24 behind a wall of a sealed record.

25 THE COURT: Why is that?

1 MR. BOLAND: Because the parties when they  
2 settled the claims that Mr. Zuckerberg has settled  
3 twice now, one that he defrauded an early stage  
4 investor, sounds familiar. He settled that case,  
5 and part of the settlement was to seal the record.  
6 That's Eduardo Saverin's case. The second case,  
7 the ConnectU case, was the now famous case that  
8 became the movie, The Social Network, another claim  
9 of breach of contract, unjust enrichment, some  
10 fraud thrown in.

11 THE COURT: How would when Facebook became  
12 operative and all of that, how would that bear on,  
13 again, the question of whether or not the expert  
14 opinions that they proffered show that the contract  
15 was a fake?

16 MR. BOLAND: Perfect. The emails that my  
17 client says indicate the time that Mark Zuckerberg  
18 was telling him that Facebook went live, those  
19 witnesses are all testifying about when Facebook  
20 went live, and the computers will say so. It will  
21 bolster my client's email as opposed to contradict  
22 their expert and their lawyers who argue otherwise.

23 THE COURT: You know who those people are?

24 MR. BOLAND: Which people?

25 THE COURT: Who know -- have personal

1 knowledge of when, in fact, it went live?

2 MR. BOLAND: I have none at all.

3 Discovery will bear that out, because the people  
4 who were founders will be able to tell us. They'll  
5 be able to say we know when it went live. We  
6 testified in these now sealed cases.

7 And there's one other point about the computers  
8 I want to make, your Honor. I was contacted in  
9 late November out of the blue by a lawyer named  
10 Tyler Mead from California who represented at that  
11 time ConnectU, the Winklevoss twins, et cetera. He  
12 was aggressively pursuing cracking open the  
13 settlement that those twins had entered into, and  
14 he said to me, I don't know what you sending me  
15 emails. I don't want any record we talked. I want  
16 you to go to the ConnectU docket and look at these  
17 specific documents, because Facebook has computers  
18 which I believe have evidence that will help you  
19 and will help my clients, and they are I trying to  
20 destroy them. We had our whole conversations about  
21 that as the court knows.

22 Here's a tie-in. Mr. Snyder finally resolved  
23 that issue by sending a letter to me and to the  
24 Court saying, we'll preserve those computers, and  
25 we know that they will be preserved, because the

1 defendants in that case -- I'm sorry, the  
2 plaintiffs in that case have withdrawn all their  
3 motions. They disappeared. And Mr. Tyler Mead  
4 refused to return my phone calls following that  
5 incident. They've just gone off.

6 THE COURT: I don't recall Mr. Snyder's  
7 representation being that way. My recollection,  
8 for whatever it's worth, subject to whatever the  
9 record shows, is that he agreed that those  
10 computers would be preserved, period.

11 MR. BOLAND: He did agree to that, but  
12 also in his communication he stated that the  
13 motions were being withdrawn by that lawyer, Tyler  
14 Mead, and all of a sudden there's another issue  
15 there. Why were those individuals withdrawing from  
16 the case? What happened there? And again, it  
17 shows you how fiercely Facebook is trying to  
18 protect those computers from my client seeing them.

19 THE COURT: Are you suggesting that  
20 something happened to Mr. Mead or something at the  
21 hands of Facebook or something? I'm not sure what  
22 your point is.

23 MR. BOLAND: No. I'm suggesting that they  
24 are fiercely protecting those computers from my  
25 client for a reason. I don't know what the reason

1 is, but there's a reason, and they went so far as  
2 to resolve the Winklevoss case.

3 THE COURT: It doesn't sound like it  
4 unless Mr. Snyder has been -- maybe that's your  
5 point -- he's been finessed, bamboozled by his own  
6 client. He's representing to the Court that  
7 they've been preserved, and now we're going to go  
8 back and look at them and they're not preserved, is  
9 that what your point is?

10 MR. BOLAND: No, your Honor. I'm not  
11 talking about preservation at all. I'm talking  
12 about the lengths they've gone to that's all.

13 THE COURT: Well, if they have preserved  
14 the computers, how can you say that they're  
15 fiercely trying to prevent people from having  
16 access to them?

17 MR. BOLAND: Two different things, your  
18 Honor. They're not violating the Court's orders.  
19 They're preserving them.

20 THE COURT: Yeah.

21 MR. BOLAND: But they --

22 THE COURT: Implying that they -- that  
23 they're available --

24 MR. BOLAND: That case went away.

25 THE COURT: -- to be reviewed if

1       necessary.

2               MR. BOLAND: Yes. That case went away  
3 because the Winklevoss twins wanted access to those  
4 computers, and Facebook said we're not comfortable  
5 with that, and somehow that case disappeared. And  
6 now they're doing the same thing here by saying  
7 there's no justification for us to access those  
8 computers. And I just pointed out to you multiple  
9 factual issues they raised that those computers  
10 will answer.

11              THE COURT: I thought it all had to do  
12 with -- I mean, I don't know anything about these  
13 things because I've never read the book and I've  
14 never seen the movie, and I don't intend to until  
15 after this case is over, whenever that may be,  
16 which means I may never see the movie or read the  
17 book at the rate we're going. But I always thought  
18 that that subject that you're referring to had to  
19 do with who owned the software, and that that's  
20 what was resolved in that litigation for better or  
21 worse, and the ownership -- I mean, I'm talking  
22 about from a copyright point of view of the  
23 software, not a business contractual point of view  
24 such as is raised in this case -- what does that  
25 have to do with whether or not this Work for Hire

1       agreement giving Mr. Ceglia half ownership or  
2       84 percent or whatever figure one wants to pick, is  
3       authentic?

4               MR. BOLAND:   What I'm talking about, your  
5       Honor --

6               THE COURT:    I'm losing you here.

7               MR. BOLAND:   I understand.   In those  
8       pleadings which some of which were excerpted into  
9       this record, it was clear that evidence from those  
10      computers bears on the issue of electronic  
11      communications between early parties involved in  
12      the founding of Facebook which would include my  
13      client, and that they weren't turned over to the  
14      Winklevoss twins, and the Winklevoss twins sued yet  
15      again saying they were defrauded into a settlement.  
16      That's all my point is.

17              And when we brought that to the Court's  
18      attention, the Winklevoss twins -- I have no  
19      information why, but I think we can all speculate  
20      what happened there -- immediately, after  
21      vociferously going after Mark Zuckerberg for a year  
22      and a half because they felt defrauded, just  
23      disappeared.   And then those computers are now not  
24      going to be accessed by those individuals, because  
25      their case is over.

1           And they're trying the same thing here to  
2       prevent Mr. Ceglia from seeing them, and we have a  
3       reason to believe that their basis for doing so is  
4       that there's information on those computers that  
5       are relevant to that stack of documents you have  
6       there. And as I pointed out, a single email  
7       message could burn that whole package down. And  
8       that's the fairness -- or the unfairness of  
9       limiting our discovery to just a few experts and  
10      then ruling on the motion. We're entitled to  
11      respond with all discoverable relevant evidence.

12           They've had nine months. They agreed to a year  
13      of fact discovery before they filed all these  
14      motions. They thought that was a suitable time.  
15      Not saying the Court would agree, but the parties  
16      agreed. They've had nine months. I think it's  
17      reasonable that we get discovery on all these  
18      issues, computers, the sealed cases, and all the  
19      experts, and we can do that in six months, which is  
20      less time than they have. I think that's  
21      reasonable. I don't think there's anything  
22      unreasonable that they can argue about that, except  
23      to protect evidence that know is going to turn the  
24      case around.

25           If you have know further questions, your Honor,



1 I'll be seated and answer anything else afterwards.

2 THE COURT: Thank you. Any rebuttal, Mr.  
3 Snyder?

4 MR. SNYDER: I do, your Honor, but may we  
5 just have a three-minute restroom break?

6 THE COURT: Oh, sure. Take a five-minute  
7 comfort break.

8 (Short recess was taken.)

9 THE COURT: Plaintiff's counsel may have  
10 flights that have to be caught. Unless they're  
11 going to make a presentation, they're welcome to  
12 depart at any time without hurting my feelings. If  
13 they wish to be heard, step to the podium and let  
14 me hear what you have to say. For example, I don't  
15 know, does Mr. Dumain want to rebut the assertion  
16 of the plaintiff regarding accusing Mr. Zuckerberg  
17 of illegal hacking?

18 MR. DUMAIN: Your Honor, if you want to  
19 hear what I said --

20 THE COURT: No, no, it's up to you.

21 MR. DUMAIN: I'll simply say this, your  
22 Honor. When your Honor looks at the transcript,  
23 you'll see that what Mr. Snyder said that I said to  
24 the Wall Street Journal bears very little  
25 relationship to the quote he then read later. I

1 was asked by the Wall Street Journal about these  
2 sort of issues, and in that specific topic I said,  
3 "That's one of the things that will have to be  
4 developed. I don't have an answer for you today."  
5 And she said, "well, can you speculate?" And I  
6 said, "Well, it has been speculated that  
7 Mr. Zuckerberg had the ability to hack in, and it's  
8 not hard to do." That's what the quote was.

9 THE COURT: Oh. So they -- they -- the  
10 reporter for the Wall Street Journal sort of, you  
11 know, gave it a little twist, if you will, and made  
12 it sound like you were making that as an assertion  
13 against Mr. Zuckerberg?

14 MR. DUMAIN: I think Mr. Snyder gave it  
15 more of a twist than the reporter did.

16 THE COURT: I see. Okay. Reporter got it  
17 right, and Snyder didn't. Reporters always get it  
18 right, you know that.

19 MR. DUMAIN: I won't go so far --

20 THE COURT: Especially since there are a  
21 few in the room.

22 MR. DUMAIN: I want go so far as to  
23 suggest that Mr. Snyder is always wrong.

24 THE COURT: When I was corporation counsel  
25 in the city of Buffalo way back when, there was a

1 reporter for the Buffalo News, Franklin Beule. He  
2 was an expert on baseball by the way. And I had  
3 just returned from Notre Dame Law School to be  
4 corporation counsel under a leave of absence, and I  
5 never knew the man. He was very -- a very charming  
6 and soft-spoken gentleman, somewhat my senior. And  
7 he would come into my office with his hands in his  
8 pockets, and he would ask me questions, and I guess  
9 they liked to talk me because I was probably one of  
10 the few high-ranking city officials who liked to  
11 talk -- not liked to talk, but was willing to  
12 talked to media, so I guess I made a lot of good  
13 copy backing in that era.

14 But anyway, he would come in and ask me a  
15 series of questions on something fairly technical  
16 that was pending before the common council or  
17 whatever it was, some major issue. And I would  
18 make some comments at some length explaining the  
19 legalities of it, and he would walk out. Next day  
20 in the newspaper he would write a column about it.  
21 And I was astounded to read that what I had said to  
22 him was quoted verbatim, including commas. It was  
23 the most amazing thing I've ever seen. I was so  
24 impressed.

25 MR. DUMAIN: Your Honor, the only comment

1 I make about speaking to reporters is that I  
2 generally try not to do it. At the end of this,  
3 the reporter thanked me for taking the time to  
4 speak with her. And I said, "Well, frankly it's  
5 because my daughter is a young journalist, so I'm  
6 feeling more sympathetic to journalists trying to  
7 get information." And but I think after this  
8 exchange, your Honor, I'm probably going to stop  
9 doing that.

10 THE COURT: Don't worry about it.

11 MR. DUMAIN: The other thing I was just  
12 going to say, your Honor, one is -- nothing to do  
13 with the merits -- but I just wanted your Honor to  
14 know I was born in Utica, so I do have some upstate  
15 blood in me.

16 THE COURT: Well, you're closer to Buffalo  
17 than Mr. Snyder, so we'll give you a point for  
18 that.

19 MR. DUMAIN: Thank you, your Honor.

20 THE COURT: And that's close to Rome where  
21 my senior law clerk is from originally.

22 MR. DUMAIN: And I have relatives in Rome,  
23 your Honor. But the point I wanted to make of  
24 substance, your Honor, is simply is this. We spent  
25 much of the afternoon talking about the expert

1 reports that defendants submitted. And I  
2 appreciate that there's a lot there, and I  
3 appreciate that there's a lot the plaintiff needs  
4 to rebut in order to overcome the motion to  
5 dismiss. But this is the motion to stay, not the  
6 motion to dismiss. And I think it's only fair,  
7 your Honor, that the plaintiff had the ability to  
8 prevail on that motion with whatever facts are  
9 reasonably out there, not just rebut the experts,  
10 although obviously we'll make every attempt to do  
11 that persuasively. But if there are facts out  
12 there in addition to that that support the  
13 plaintiff's claim, we're entitled to that on a  
14 motion where the defendants are trying to get rid  
15 of this case in totality.

16 What we can get in discovery here is not  
17 burdensome to them. Deposing the experts is not  
18 burdensome to them. Getting those computers that  
19 Mr. Boland talked about is no burden to them, and  
20 getting the discovery that they've already produced  
21 that's in the can in other litigation is no burden  
22 to them, and that's what I would submit would be  
23 reasonable.

24 THE COURT: Well, I don't know that they  
25 have access to all of that Boston litigation.

1 MR. DUMAIN: Oh, I think they do. I think  
2 they do. They were a party to it. Talking about  
3 case -- I'm talking about cases where Zuckerberg --

4 THE COURT: Oh, I see, Mr. Zuckerberg is a  
5 party to it. Yeah.

6 MR. DUMAIN: And with that, I appreciate  
7 your offer to allow me to leave early, but I will  
8 stay.

9 THE COURT: Stay with us for a while.

10 MR. DUMAIN: I will stay. Thank you, your  
11 Honor.

12 THE COURT: All right. Mr. Snyder.

13 MR. SNYDER: Thank you, your Honor. Your  
14 Honor asked a question of Mr. Boland why isn't this  
15 in the papers, and the answer is clear. Because  
16 had what much of what he said been put in the  
17 papers, it would have had to be signed pursuant to  
18 Rule 11, and they did not want to do that. And  
19 that's because I counted at least four -- so I'll  
20 highlight those and then address some other  
21 points -- egregious and disturbing  
22 misrepresentations made by Mr. Boland about  
23 evidence and other material facts,  
24 misrepresentations that are so glaring that I would  
25 respectfully submit to your Honor that this Court

1 cannot and should not trust or credit anything he  
2 says in this court that isn't certified.

3 Let me catalog them. They're very clear and  
4 explicable. First, he said that with pitched voice  
5 repeatedly that the ink testing is junk science. I  
6 don't have the quotes written down. I stopped  
7 writing them down. But he basically said, your  
8 Honor, repeatedly no one has endorsed that, that  
9 that's nonsense and we will show that.

10 THE COURT: The evaporation technique.

11 MR. SNYDER: The PE testing.

12 THE COURT: Yes.

13 MR. SNYDER: That is false, and it must be  
14 knowingly false. The reason why is first -- let me  
15 just give you some background of the test and then  
16 I'll give you the punch line. So, first of all, he  
17 said every court that has considered it, it's never  
18 survived a Daubert challenge. False. Provide a  
19 citation. There are none.

20 Second, background fact, government forensic  
21 laboratories around the world PE testing to date  
22 ink. But here it is, PE testing has been  
23 scientifically examined and validated in numerous  
24 studies cited by LaPorte. At least five of them,  
25 your Honor, were authored in full or in part by

1       who? Plaintiff's own expert, Valery Aginsky. So,  
2       if you go to Mr. LaPorte's -- so, if you go to  
3       Mr. LaPorte's affidavit provided to the Court on  
4       page 7 he cites, Aginsky, Current Methods for  
5       Dating Documents, Which is Best? 1997, Aginsky,  
6       Measuring Ink, Extractability is a Function of Age,  
7       et cetera, et cetera.

8       But there's more. Mr. LaPorte published an  
9       article on PE ink dating when he was at the Secret  
10      Service that was coauthored by four other authors  
11      at the Secret Service. Now, articles published by  
12      members of the Secret Service must go through an  
13      elaborate vetting process, reviewed by branch  
14      chiefs, lab directors, and then the public affairs  
15      department. All of those department heads approved  
16      Mr. LaPorte's article on PE testing, including the  
17      lab director at the time, who? Plaintiff's expert,  
18      Larry Stewart. So Mr. Boland told, your Honor,  
19      that this was junk science that no one had ever  
20      whatever --

21               THE COURT: Accepted it.

22               MR. SNYDER: Except his two experts.  
23      That's point one. Point two is he told your Honor  
24      falsely that when he had no answer for the  
25      StreetFax contract, no answer to explain the



1 StreetFax contract and how it was sent in an email  
2 signed Paul from the Seagate drive with his phone  
3 number to Sidley Austin. And your Honor asked him  
4 about the privilege log, and he said falsely to  
5 your Honor oh, well, that was just -- I don't know,  
6 maybe Lake. And then he said it was said -- it was  
7 just said to his lawyer. That's false. That's  
8 wrong.

9 Document 241-2 filed in this case on  
10 October 28th, 2011, lists as the first item in the  
11 privilege log, March 3, 2004, email from Paul  
12 Ceglia -- from Paul Ceglia to his attorney, Jim  
13 Kole, Esquire. And those -- page 1 of signed and  
14 dated StreetFax contract, attorney-client  
15 privileged. That is a judicial admission that is  
16 binding as a matter of law and ends the case  
17 without the need to subject Facebook and  
18 Mr. Zuckerberg to more expense and burden of any  
19 discovery. I'll submit to your Honor case law  
20 after this hearing that when -- when -- when a  
21 party submits a pleading that represents facts to a  
22 court, that's binding.

23 THE COURT: I know that, Mr. Snyder.

24 MR. SNYDER: And Mr. Boland knowingly  
25 mischaracterized this document. There's a third

1 one that is equally egregious.

2 THE COURT: Is this the third  
3 misrepresentation?

4 MR. SNYDER: Yes.

5 THE COURT: I just want to -- while you're  
6 looking for it --

7 MR. SNYDER: Yes.

8 THE COURT: -- I just want to note however  
9 what I think he said was that the -- I'm not sure  
10 what he really meant by it, but the implication was  
11 that, I guess, the admission is not an admission  
12 because he said it came from the parent's computer.

13 MR. SNYDER: No, but that was a different  
14 point, which was absurd.

15 THE COURT: Oh.

16 MR. SNYDER: The point is that he was  
17 saying it didn't even say from Paul Ceglia to Jim  
18 Kole. It just said to his attorney, as if somehow  
19 in excess of an abundance of caution they just  
20 designated in a blanket way all emails that they  
21 thought might be to an attorney. No. The lead --  
22 the number one document they sought to shield is  
23 the StreetFax contract page one, and they describe  
24 in perfect detail its province.

25 Mr. Boland said, again, falsely, wrongly,

1 nobody knows its province. Guess who knows its  
2 province? His client knows its province, because  
3 in a judicial admission he told your Honor its  
4 province. It's an email from Paul Ceglia. There's  
5 no further inquiry necessary. And there's no way  
6 to get around that unless he's going to accuse  
7 Mr. Lake of misrepresenting him again when -- like  
8 he did when Lake said that he instructed him not to  
9 file --

10 THE COURT: I'm trying to recall  
11 specifically. The attachment, the StreetFax was  
12 signed what was sent to Kole?

13 MR. SNYDER: Yes, your Honor.

14 THE COURT: Signatures were on there?

15 MR. SNYDER: Yes, your Honor.

16 THE COURT: All right. And Mr. Zuckerberg  
17 has under oath acknowledged that that was the  
18 contract?

19 MR. SNYDER: What Mr. Zuckerberg submitted  
20 on June 1, 2001, it's the third he  
21 misrepresentation that Mr. Boland made.

22 THE COURT: Oh, okay.

23 MR. SNYDER: He said repeatedly,  
24 amazingly, I would say disturbingly, that Mark  
25 Zuckerberg didn't deny signing the Work for Hire

1 contract. He said that repeatedly. Paragraph 5 of  
2 Mr. Zuckerberg's declaration, which is document 46,  
3 "I did not sign the document attached as Exhibit A  
4 to the amended complaint."

5 Now Mr. Boland told your Honor that he was not  
6 clear and more clarity was required. How can one  
7 be more clear than that? And in case there was any  
8 doubt, in paragraph 8 he asserts "The document  
9 attached as Exhibit A to the amended complaint is  
10 not the written contract I signed. The written  
11 contract I signed concerned only the development of  
12 StreetFax's website, period. It did not mention or  
13 concern the Facebook.com or any related social  
14 networking service or website."

15 Paragraph 10, "I did not enter into any  
16 agreement, written or otherwise, with StreetFax,  
17 Ceglia, or anyone affiliated with Ceglia concerning  
18 Facebook or any related social networking site."  
19 He swore to that and submitted it to your Honor  
20 before Stroz Friedberg found the Work for Hire  
21 document, StreetFax document on the concealed  
22 Seagate hard drive. So he identifies perfectly  
23 in 2011 the StreetFax contract of which he did not  
24 keep a copy, which Mr. Ceglia did keep a copy.

25 The next egregious misrepresentation --

1           THE COURT: But the point is that he --  
2           did he also go on to say at some point that the  
3           StreetFax contract is the correct contract?

4           MR. SNYDER: He hasn't, but certainly that  
5           would be easy to do.

6           THE COURT: But he's willing to, you're  
7           sure?

8           MR. SNYDER: Oh, for sure. The next  
9           egregious misrepresentation, which, again, it's  
10          almost -- it's almost bizarre that he would -- that  
11          Mr. Boland would do this, because it's so contrary  
12          to the evidence. He said there's no evidence -- in  
13          referring to the USB devices that his client  
14          spoliated during this case, he said, quote,  
15          "There's no evidence as anything relevant to this  
16          case." That's what he told your Honor.

17          Now, it's a matter of objective science that  
18          attached to those USB devices or stored on those  
19          USB devices were documents entitled Zuckerberg.tif.  
20          The tiff file is the form of the StreetFax contract  
21          found on the Seagate hard drive. I challenge these  
22          attorneys to identify a document more relevant and  
23          central to this case than page 1 and page 2 of the  
24          StreetFax contract in tiff form.

25          Mr. Boland told your Honor casually and falsely

1       that there's no evidence that's anything relevant  
2       to this case. It renders everything he says not  
3       certified pursuant to Rule 11, I would say,  
4       superfluous. And your Honor points out that  
5       they've had years to authenticate the Work for Hire  
6       document. They've had years to -- they've had  
7       since August to dispute the StreetFax contract.  
8       They knew it was coming. DLA Piper we have reason  
9       to believe was aware of the StreetFax contract  
10      before they even filed the amended complaint and  
11      their experts were too. So they all knew or should  
12      have known that this was coming, and did nothing at  
13      all to come up with an explanation for it other  
14      than this newfangled one that Mr. Dumain says he  
15      was now speculating about, and that Mr. Boland was  
16      tongue-tied when he tried to articulate, all of  
17      which is noise and irrelevance what these attorneys  
18      say, because their clients said in a judicial  
19      admission that page one of the signed and dated  
20      StreetFax contract -- that's their words in there  
21      privilege log -- page 1 of signed and dated  
22      StreetFax contract between Mark Zuckerberg and Paul  
23      Ceglia is attached to a March 3, 2004, email from  
24      Paul Ceglia to his attorney, Jim Kole. It's  
25      irrelevant what they say.

1           Their client has told, your Honor, the province  
2           of that document. That ends the case without any  
3           need for the abusive discovery into prior  
4           litigations, and computers, and laptops, all of  
5           which is based on Mr. Boland's rank speculation,  
6           what if we find an email? Well, on that theory, he  
7           should be able to depose everyone. What if I  
8           depose Mark Zuckerberg's cousin or brother or  
9           sister? Maybe they'll come up with some admission.

10          A plaintiff before this Court destroying  
11          evidence, spoliating evidence, with a mountain of  
12          evidence that this is a fraudulent lawsuit does not  
13          have the right to conduct that kind of discovery  
14          when it is not central to the question before this  
15          case, is the StreetFax contract authentic and real,  
16          and is the Work for Hire document a fake?

17          Now, they seem to have though all sorts of  
18          experts who are prepared to opine on this issue.  
19          So what I would respectfully submit is the  
20          appropriate procedure is that the plaintiff be  
21          given an opportunity, whatever is a reasonable  
22          amount of time, to submit all of their expert  
23          affidavits, and -- in opposition. If the Court has  
24          questions or wants further information, the Court  
25          can direct the parties to address specific targeted

1 questions. The Court knows the record extremely  
2 well. That is the efficient process.

3 THE COURT: I'm trying to.

4 MR. SNYDER: That is the fair process  
5 under these circumstances. It will avoid months of  
6 discovery -- six months will turn into a year and a  
7 half -- untold expense, millions of dollars of  
8 additional costs, delay, discovery litigation. If  
9 we were here five times on his non-compliance, you  
10 can imagine how many times we'll be before this  
11 Court on discovery fights based on their  
12 speculation, and when he referenced -- I couldn't  
13 believe that Mr. Boland brought up that  
14 Thanksgiving eve abusive motion, because it just is  
15 emblematic of the litigation approach here, which  
16 is to drive up cost, drive up expense, mention the  
17 Winklevoss twins as many times as they can, as if  
18 that has anything to do with this criminal fraud on  
19 the court.

20 And so what is what is fair in these  
21 circumstances is the procedure I outlined.

22 Two more points. It's not irrelevant that this  
23 is not the first time that Mr. Ceglia has been  
24 before a court accused of crimes. It's not  
25 irrelevant --



1           THE COURT: Wait. Wait. Wait. Wait a  
2 minute. He's not accused in this Court of  
3 anything.

4           MR. SNYDER: We are accusing him of  
5 committing a criminal act. It's not the first time  
6 that this plaintiff has been -- defrauded people.  
7 He's been arrested for defrauding people. He has  
8 forged government documents to steal money from  
9 senior citizens in land scams. He's addressed none  
10 of that to date. We set that out in June that this  
11 is a serial felon who has been scamming and ripping  
12 off people for years. And he's been scamming this  
13 Court and scamming us from day one. And to now  
14 give him license to conduct wide-ranging discovery,  
15 when on the good cause showing your Honor didn't  
16 think it was appropriate, would be not only  
17 rewarding him for his misconduct, but delivering  
18 him exactly what he hoped he could get from the  
19 judicial machinery when he concocted this document  
20 and filed this lawsuit, which is the final point.

21           Mr. Boland said something that was fascinating.  
22 He said the original trumps the digital. The  
23 original trumps the digital. All the case law says  
24 that. Judges back off, juries step in. It's a --  
25 it's a gimmick. It's a -- maybe even a little bit

1 of a limerick. But the original doesn't trump the  
2 digital when the objective evidence and science  
3 shows that the original is fake, and the plaintiff  
4 has admitted in a document submitted to your Honor  
5 that he sent the digital.

6 1008 is irrelevant in the context of the  
7 exercise of inherent power. He says we can't take  
8 it out of a jury's hands. That's precisely what  
9 the Supreme Court and the Second Circuit instructs  
10 trial courts to do where there's clear and  
11 convincing evidence of fraud. Not rewarding the  
12 recidivist felon by permitting him to depose Mark  
13 Zuckerberg and rummage through computers that have  
14 nothing do with the central issues before this  
15 Court. And I have every confidence in the world  
16 that your Honor, after reading our papers and the  
17 opposition papers, if your Honor thinks any  
18 additional information is necessary, that your  
19 Honor will let us know, and we can address it in an  
20 efficient, fair way as opposed to turning the  
21 plaintiff's loose on Facebook and Mr. Zuckerberg,  
22 which would be giving them exactly what in their  
23 litigation overview plan they hoped for when they  
24 concocted this lawsuit. Thank you.

25 THE COURT: So is there something that you

1       need to say in response to that, Mr. Boland?

2               MR. BOLAND: Yes, your Honor, briefly.

3       Mr. Snyder has a habit and I'm not going to go into  
4       the details of misstating what I said, and then  
5       arguing against it. It's kind of a debate  
6       technique that's really not effective if you've  
7       ever had kind of public speaking training. So I'm  
8       not going to go into it.

9               He made several misstatements and argued  
10       against them --

11              THE COURT: I think its called a straw  
12       man.

13              MR. BOLAND: Yes. Well, we'll use that  
14       term. And so I'm not going to address them. I  
15       think the Court knows exactly what I said, and that  
16       he makes up stuff and then argues against himself,  
17       and he wins the argument -- or I don't know if he  
18       wins. Perhaps he'll win on his ride home or  
19       something.

20              Our expert, Mr. Stewart, is not going to  
21       endorse the PE test. That's a false statement.  
22       There's no report out there including what he  
23       referenced where Larry Stewart's going to say, you  
24       know, this test is really reliable. In fact the  
25       opposite. He will eventually communicate to this

1 Court after our reasonable six-month period of  
2 discovery that he was the supervisor for their  
3 expert, Gerald LaPorte, and issued memos at the  
4 Secret Service telling him you may not use this  
5 test in any case work in our agency, because it is  
6 not reliable. You can continue to test it. You  
7 can continue to go in a back room somewhere and run  
8 samples and try to figure out why it's junk. But  
9 you will not use it in case work. And there is not  
10 a government agency in the United States which  
11 relies on that test. He knows better.

12 You know what he's talking about  
13 internationally known, Canada. Two people in  
14 Canada that were trained by Mr. Aginsky.  
15 Mr. Aginsky is an expert who took a photograph of  
16 this contract, offered some information about  
17 nondestructive testing of the ink. He was not  
18 hired, will never be hired in this case to talk  
19 with PE testing. We have determined, ourselves and  
20 the other experts, that that test, as he pointed  
21 out, which was kind of a strange comment, show me  
22 the case where the PE test has failed to pass a  
23 Daubert test. Well, if it's failed to pass a  
24 Daubert test, it wouldn't get into any trial  
25 anywhere. But we will have cases where --

1           THE COURT: Usually -- well not usually,  
2 but oftentimes courts do write written opinions  
3 when you have Daubert exclusion motions.

4           MR. BOLAND: They do, but there's  
5 challenges to Daubert where Mr. LaPorte -- the  
6 lawyers have Mr. LaPorte slink away and withdraw.  
7 As soon as the pleadings come in, he bails out.  
8 Because -- and there's cases -- federal cases we  
9 will point out to you, and even criminal cases  
10 which is a travesty where he has attempted to take  
11 someone's liberty based on his testimony on science  
12 he knows is garbage. And that's happened in the  
13 past with federal agencies and others who have come  
14 in and talked about striations on bullets or other  
15 types of science, which years down the road has  
16 proven either to be bad science or the expert  
17 themselves has fabricated data, and then all kinds  
18 of trials have to start all over again.

19           This is not a shocking thing for a man who  
20 currently works for the government and then  
21 moonlights on the side in these kinds of cases to  
22 have been engaged in using a test that his own  
23 government agency he works for doesn't allow him to  
24 use. But when he moonlights at 4 or 500 bucks an  
25 hour, getting his checks from Facebook, he's more

1       than happy to use that ridiculous junk science and  
2       try to persuade you in paperwork that that's a  
3       basis for determining that that ink is less than  
4       two years old.

5             Your Honor, we're asking for something that's  
6       eminently reasonable, and it appeals to this  
7       Court's sense that it expressed in December of  
8       fairness. And in these cases with substantial  
9       claims like this, the Court I think hit it on the  
10      head when you said this -- the issue of fairness is  
11      heightened. And to dismiss a case and claims of  
12      this type by merely allowing us to submit some  
13      paperwork to attempt to respond to nine months of  
14      work that they've put in with a ton of conclusions  
15      that we would not have anticipated, I think goes  
16      against what the Court indicated its inclination  
17      was, which was to be fair to Mr. Ceglia. This is  
18      reasonable discovery.

19            It's -- if the defendants are concerned about  
20      whatever information's going to be found on those  
21      computers that it thinks are not relevant, the ESI  
22      protocol that was used, that they used and agreed  
23      to and that we would adhere to would resolve that.  
24      They can strike for privilege everything they want.  
25      Nothing gets released. And if they have concerns

1 about information being other than for attorney's  
2 eyes only, they can make a motion, and they can  
3 have that information control.

4 But this is a claim that merits minimal three  
5 months less than the discovery they received so  
6 that we can properly rebut, not just the experts,  
7 but the factual claims, the claims about when or if  
8 my client electronically communicated with their  
9 client. It is -- it would -- it's an outrageous  
10 statement for them to make that computers that  
11 Mr. Zuckerberg used to communicate by email, et  
12 cetera, with people in '03 are an improper place  
13 for us to look to see if my client's emails, which  
14 he pulled off his Harvard server, if he did, are  
15 sitting there. That's not outrageous. This is a  
16 good-faith discovery request.

17 THE COURT: Yes. But we do come -- before  
18 you leave the podium, we do come back to the  
19 StreetFax contract issue, don't we?

20 MR. BOLAND: In what regard?

21 THE COURT: Well, I mean it was fairly  
22 well established based on the privilege log filing  
23 from your client that the StreetFax contract was a  
24 document that he acknowledged as a contract between  
25 himself and Zuckerberg.

1 MR. BOLAND: Well --

2 THE COURT: I mean, we just heard from  
3 Mr. Snyder about the privilege log.

4 MR. BOLAND: The privilege log related to  
5 an email communication between himself and  
6 Mr. Kole. I think, your Honor --

7 THE COURT: And it references the  
8 StreetFax contract, doesn't it?

9 MR. BOLAND: It references the StreetFax  
10 contract, but the privilege designation does not --  
11 they show no case law which indicates that a  
12 privilege designation means that the lawyer is  
13 saying and the client is saying everything in that  
14 document is totally authentic, no one altered my  
15 email, no one altered the attachment. It's all  
16 exactly as I sent it. That's not what a privilege  
17 designation says.

18 THE COURT: It's not an admission that  
19 it's a contract between Zuckerberg and your client?

20 MR. BOLAND: Not at all. Especially  
21 because the attachment's not readable. So to  
22 impute to my client knowledge that he actually  
23 reviewed that attachment and said oh, yeah, that's  
24 definitely something I sent to Jim Kole, it's not  
25 readable. When you bring that document up on a



1 screen, can't read it. When you print it, it  
2 prints eight and a half by 11, it's unreadable.  
3 Now they transposed it somehow and put in a  
4 certification about that, but that doesn't change  
5 the fact that the document's unreadable.

6 And moreover, you know from your practice of  
7 law, and these lawyers know as well, the way these  
8 privilege designations can be done is individuals  
9 saying, look, that's a letter between my client and  
10 so and so, that's privilege. Let's move on to the  
11 next one. I'm not representing how it was done,  
12 but I'm telling your Honor that that designation of  
13 a document that later turns out to be something  
14 that wasn't authored by my client doesn't convert  
15 it into something authored by my client. It just  
16 doesn't.

17 THE COURT: He made a mistake is what  
18 you're saying.

19 MR. BOLAND: There could be a wide variety  
20 of reasons. He made a mistake, or he read it and  
21 said what are all these extra words, or what is  
22 this attachment? I never sent attachment like this  
23 to Jim Kole. These are emails from '04 they're  
24 claiming, that's at that time eight years earlier.  
25 So if someone presented you an email from eight

1 years ago between you and a client and said is this  
2 privileged? Your reaction would be, of course,  
3 it's privileged, it's me and my client, and then  
4 later you discover oh, wait a minute, I know I sent  
5 a bunch of emails between my client, but, you know,  
6 what, that's not one of them. I thought it was,  
7 but it's eight years old.

8 THE COURT: I forgot to ask you, which  
9 expert is it that did the analysis which showed  
10 that the baked so-called first page, if not the  
11 second page of the so-called Work for Hire contract  
12 was exposed to ultraviolet light? Which expert was  
13 that.

14 MR. SOUTHWELL: Mr. Tytell.

15 THE COURT: Tytell.

16 MR. SOUTHWELL: And Mr. LaPorte, both.

17 THE COURT: I forgot to ask you, I guess  
18 I'm assuming I know what the answer is now, that  
19 your experts will explain that it's, you know, junk  
20 science.

21 MR. BOLAND: No.

22 THE COURT: That the -- that the document  
23 was taken out of the safe deposit box -- at one  
24 point when it was submitted to Mr. Aginsky for  
25 analysis it, it had an appearance. And then later,

1       six months later, it had a different appearance,  
2       and according to their experts, Tytell and --

3               MR. SOUTHWELL:   Mr. LaPorte.

4               THE COURT:   LaPorte, Mr. LaPorte, it  
5       showed through scientific analysis that it had been  
6       subjected to intense ultraviolet light --

7               MR. SNYDER:   Or sunlight, right.

8               THE COURT:   In order to create certain  
9       characteristics and help to dry out the ink that  
10      was on the document, particularly the ballpoint  
11      interlineations and the signatures.  The pictures  
12      are worth a thousand words.  I mean, they do tend  
13      to show, don't they, that the document had peculiar  
14      spacings in it as if it was being clasped in order  
15      to be exposed to sunlight?

16              MR. BOLAND:   Yes, your Honor.  I can  
17      address that in two ways.

18              THE COURT:   That's not evidence of  
19      spoliation by your client?

20              MR. BOLAND:   Not at all, and I'll explain  
21      why.  We went over this issue if December, and the  
22      Court had me do a demonstration for Mr. Snyder's  
23      benefit of why, for the ink fading issue, comparing  
24      one scan where the ink appears intense and vibrant,  
25      and another scan taken later by a different person

1 with an unknown machine and unknown settings where  
2 the ink appears faded was the repeated apples to  
3 bowling pins thing that we talked about. And the  
4 Court asked Mr. Snyder, "Do you understand what  
5 Mr. Boland's arguing about why you can't compare  
6 those?" And he said, "I don't understand it." We  
7 took a break, and I visually demonstrated it on the  
8 record with exhibits and pointed out to the Court,  
9 and then you said to him, do you understand. It  
10 now?

11 So we dealt with the ink fading issue. They're  
12 comparing two disparate scans and trying to say  
13 because they're different, therefore something was  
14 done to the document. Now that's on the fading.

15 On the yellowing, our experts don't have  
16 anything they need to say to prove who yellowed the  
17 document. Here's why. I showed you at the  
18 December hearing, it's on the record, their own  
19 expert Tytell's scan the day they got the document  
20 to evaluate, their own expert Lesnevich's scan 24  
21 hours later, and I put them side-by-side. These  
22 came from their pleadings, not mine. And you said  
23 to Mr. Snyder "It appears from that demonstration  
24 Mr. Boland's just done that the document was  
25 discolored while it was in your expert's

1       possession." And Mr. Snyder said, "We reject that,  
2       your Honor."

3               But a picture is worth a thousand words. I  
4       don't have the exact exhibit that I used, but it's  
5       on the record of that transcript, and the Court  
6       agreed -- it wasn't difficult to agree, because you  
7       can see a light-colored document and a yellow one,  
8       and it's their two experts. In the first 24 hours  
9       that they had that document, they subjected it to  
10      excessive UV light.

11              THE COURT: Not according to the latest  
12      report. They actually put a timer on it, and the  
13      amount of time that it was exposed to the UV  
14      analysis was a matter of seconds.

15              MR. BOLAND: That's their claim. But it's  
16      not --

17              THE COURT: Well --

18              MR. BOLAND: Fine, your Honor, let's say  
19      that that's their claim. It's undeniable from  
20      their exhibits that document got yellow within 24  
21      hours of them getting it. And moreover, in  
22      addition to getting yellow during that time, their  
23      expert's using that VSC machine. Guess what the  
24      VSC machine has in it to make sure the paper  
25      doesn't move while you're putting it under that

1 intense light? It has clips.

2 THE COURT: That match the clips in the  
3 image?

4 MR. BOLAND: I don't think they're going  
5 to match the clips, and here's why. They put the  
6 document in and out so many times that it was  
7 slightly jogged to the left or to the right, and  
8 they kept exposing it in different areas to that  
9 intense UV light. They did this over four days.

10 Our experts already gave declarations to this  
11 Court saying they have never before seen such an  
12 excessive use of that machine. So, by doing that,  
13 they have not only yellowed the document, they've  
14 then created those little marks, but moreover,  
15 where are we now about challenging this ink fading  
16 issue?

17 Here's a fairness problem for the Judge to  
18 consider. We can't go back because they yellowed  
19 it in their possession. How do we go back now and  
20 say no, the ink wasn't that faded when you got it,  
21 because you burned the thing up with UV light, and  
22 you ruin our opportunity to challenge it. Now  
23 isn't that convenient that they make an allegation  
24 with expert reports that in a sense they've tied  
25 our hands behind our back and say you can't

1 challenge it, but we should be entitled to a  
2 dismissal on that basis, even though we've ruined  
3 the document for you to rebut us.

4 And that's something else that we'll bring up  
5 in our response after our reasonable period of  
6 discovery is that there's a fairness issue with us  
7 being able to rebut certain things they argue  
8 because they damaged the key evidence in the case.

9 If you have no further questions, your Honor,  
10 that's all I had to say.

11 THE COURT: Thank you. Well, I think  
12 we're going to -- did you want to respond to that,  
13 Mr. Snyder, briefly? Anything?

14 MR. SNYDER: I have nothing further to  
15 say, your Honor.

16 THE COURT: Okay. We're going to grant  
17 the motion in part and deny it in part. We're  
18 going to stay general discovery, but permit a  
19 limited period of expert discovery for the  
20 plaintiff and the defendants.

21 I'll give the plaintiffs 60 days to depose  
22 defendants' experts to prepare an opposition to the  
23 motion to dismiss. And then how much time after  
24 that would you need to file your written response,  
25 including your reports?

1 MR. BOLAND: Your Honor, 60 days.

2 THE COURT: Sixty days?

3 MR. BOLAND: Yes.

4 MR. SNYDER: My question is, your Honor --  
5 and we put this in our papers. We welcome expert  
6 depositions. Certainly we think more in the record  
7 the better in terms of our expert reports. So,  
8 what we said in our papers is that if your Honor  
9 was inclined to give expert discovery, that we  
10 think it's appropriate for them to give us their  
11 expert reports presumedly before those depositions  
12 so that we have -- that's the normal procedure that  
13 you exchange expert reports before depositions so  
14 that our experts have an opportunity to read and be  
15 prepared to respond to. Otherwise, they're going  
16 to be asked 400 questions at a deposition about  
17 technical tests and other things that our experts  
18 won't have a chance to study or respond to.

19 So if the goal here is to provide your Honor  
20 with the best information, as opposed to some  
21 ambush, then the best procedure we believe is that  
22 they give us their expert reports responding to our  
23 expert reports, they depose our experts, we can  
24 depose their experts. Certainly we should have the  
25 opportunity to depose their experts. And then they



1 can put in their opposition papers, and we'll put  
2 in our reply papers that utilize that material.

3 If our experts are deposed by Mr. Boland with a  
4 deposition outline that is their expert report, but  
5 they're not giving us the expert report, it's just  
6 unfair. And that's so expert discovery obviously  
7 generally proceeds in that -- in that fashion. So,  
8 if they want a period of days to submit their  
9 expert report and then --

10 THE COURT: I think part of the difficulty  
11 is in this instance they need -- the experts need  
12 to have the defendants' experts deposed in order to  
13 do a thorough job of filing or preparing a report.

14 MR. SNYDER: But under rule -- under the  
15 expert rules, I mean, civil procedure it's  
16 anomalous for one side to put in their expert  
17 reports, and then be deposed.

18 THE COURT: Well, I know that. But this  
19 is a little different.

20 MR. SNYDER: I don't think it is  
21 different. I think he's characterized it that way  
22 to gain an unfair tactical advantage, so that he  
23 doesn't have to show his hand before he takes our  
24 expert depositions. This is the normal case where  
25 we've given our experts. I mean, usually we

1 have -- one side is given the expert reports, the  
2 other side gives their expert reports. Sometimes  
3 they're simultaneous exchanges. And then  
4 depositions proceed. I've never heard of expert  
5 discovery proceed in the fashion where one party  
6 gets one side's expert reports and takes  
7 depositions, and then has the opportunity to put in  
8 their own reports, unless we then after they submit  
9 their reports, you know, can have supplemental  
10 reports. But we're just going to be in an  
11 inefficient mode there.

12 So I think they should have 30 days, let's say,  
13 or whatever they want, to give us their expert  
14 reports. Then we depose their experts. They  
15 depose their experts, and we can provide the Court  
16 with whatever information in connection with the  
17 motion to dismiss is -- is appropriate.

18 I don't see this as any different than the  
19 normal case, only Mr. Boland says we don't know  
20 what they're talking about. Well, the expert  
21 reports are very clear in terms of methodology,  
22 tests utilized, conclusions drawn.

23 THE COURT: I think that's his point, that  
24 he wants to depose your experts on exactly all of  
25 the issues -- not issues, but analyses that are put

1       forth in the reports. So there's no -- what  
2       surprise is there in that?

3               MR. SNYDER: The reason the Federal Rules  
4       provide for either simultaneous exchange of reports  
5       or the sequential series of reports before  
6       depositions is precisely to avoid the kind of  
7       deposition ambush that the advisory committee notes  
8       to the expert rules talk about. So it would be  
9       unfair for us -- for our experts to be deposed with  
10      them keeping their expert reports in their back  
11      pocket. We should see their expert reports.

12             THE COURT: I think that's the point,  
13      they're not going to have a report until they  
14      depote your client.

15             MR. BOLAND: Yes, and they already agreed  
16      to give us the reports in expedited discovery.  
17      That was their agreement to give them to us.

18             THE COURT: That's why --

19             MR. SNYDER: But then we're going to have  
20      the anomaly where their expert reports --

21             THE COURT: I know.

22             MR. SNYDER: -- talk about our  
23      depositions. It really makes no good sense and  
24      would be unfair. They've already been talking to  
25      their experts. Their experts have an opportunity

1 to comment on our report so that our expert is  
2 aware of and can prepare to rebut their expert's  
3 challenge.

4 THE COURT: Let's say they file a  
5 report -- just take the scenario -- in response to  
6 your motion.

7 MR. SNYDER: Yes.

8 THE COURT: And this is all preparatory to  
9 filing a formal document rebutting the motion --

10 MR. SNYDER: Yes.

11 THE COURT: -- to dismiss. I haven't even  
12 addressed the statute limitations laches issue,  
13 which I almost hesitate to go there, because I  
14 think I know what Mr. Boland is going to say. He  
15 says we need plenary discovery on that in order to  
16 establish accrual dates and so forth. I'm hesitant  
17 to even launch that one, but we may have to.

18 But he's saying that in order for him to  
19 prepare a response to this motion, his expert needs  
20 to be able to query your expert about their  
21 methodologies above and beyond what they read in  
22 the document.

23 MR. SNYDER: I would respectfully submit  
24 that that's not the way the Federal Rules treat  
25 expert discovery precisely for the reason I said,

1       that it's either simultaneous exchange of reports,  
2       sequential exchange responsive reports, which is  
3       what I'm proposing, followed by depositions, for  
4       the precise purpose that the drafters of the rule  
5       want to avoid the kind of surprise and inefficiency  
6       that will result if our experts have to rebut  
7       expert -- because his deposition questions will be  
8       substantially informed by consultation with  
9       experts, who then will prepare a report.

10       And so, it would be anomalous for him to take  
11       our depositions and contrary to the Federal Rules  
12       of Evidence dealing with experts to take our  
13       expert's deposition without first giving us the  
14       report. This is -- in every case a plaintiff can  
15       say well, I want to test the defendant's expert's  
16       methodology, we can't put it in a report yet. But  
17       that's not what the expert rules provide for. They  
18       just -- and -- and it would be very unfair for any  
19       of the experts.

20       THE COURT: If we do that, it's going to  
21       be a very elongated process.

22       MR. SNYDER: I don't think so, not  
23       particularly.

24       MR. BOLAND: Your Honor, the rules also  
25       contemplate full fact discovery before the experts

1 have done what he describes. We don't have that  
2 here. This isn't -- he said early on this is not  
3 the normal case. Now all of a sudden when it  
4 conveniences them, it's the normal case, do the  
5 normal thing.

6 This is not the normal case. They agreed to  
7 give us the reports. We've had no fact discovery,  
8 and you're giving us this opportunity to depose  
9 their experts. I think it's eminently fair given  
10 how one side of the discovery has been thus far. I  
11 don't think there's anything unfair about it at  
12 all. I think in Mr. Snyder's world we just should  
13 get nothing and just walk out of here and every  
14 client he represents should have the same result.

15 THE COURT: Well --

16 MR. SNYDER: Your Honor, we're simply  
17 saying that in the most efficient and fair way is  
18 for them to give us their expert reports, for  
19 expert depositions on both sides to proceed, and  
20 then --

21 THE COURT: And then what?

22 MR. SNYDER: And then they'll file their  
23 opposition, and we will file our reply in the  
24 ordinary course. And we can do it as expeditiously  
25 as your Honor wishes. You know, we have no

1 interest in -- in delay here at all. I mean, as we  
2 said in our reply papers, we're happy to have  
3 expert depositions. We invite a bigger record on  
4 the fraud. The more evidence of fraud in the  
5 record, the better. We think it's -- obviously we  
6 respect your Honor's ruling. I put it in the reply  
7 paper because I thought your Honor might rule a  
8 deposition.

9 THE COURT: Well, I am inclined to do  
10 that. I'm sort of trying to be consistent. I  
11 raised the issue myself back in December.

12 MR. SNYDER: Sure.

13 THE COURT: And here we are now where we  
14 have to proceed. All I'm looking for is an  
15 efficient way to get to the opposition papers.

16 MR. SNYDER: They wanted six months for  
17 something, so they were prepared to live with six  
18 months. We can live with three, six months. So if  
19 they want to have 60 days to file their expert  
20 reports, 60 days for depositions, that's 120 days,  
21 that's -- how many months is that? That's only  
22 four months. They can put in their opposition in a  
23 month, that's five months. We'll put in our reply  
24 in three weeks or a month, that's six-month period.  
25 The whole thing will be submitted to your Honor.

1           THE COURT:   And then when will you do  
2   their depositions?

3           MR. SNYDER:   If we think that anything is  
4   pertinent for our reply papers, we'll put them in  
5   our reply papers.   And your Honor then will have an  
6   even bigger and better record of fraud than your  
7   Honor has now.   I have every confidence in the  
8   world that that will be the result.   It will just  
9   be justice a little bit delayed.

10          And if your Honor believes that expert  
11   discovery is necessary, I think the cost to the  
12   system, and, frankly, to us, is that extra time.  
13   Because there's no way to short circuit 12  
14   depositions.   And I don't think we can short  
15   Circuit giving us their reports.   That's just not  
16   fair, and it is contrary to the Federal Rules  
17   governing experts.   And so we're happy to, again,  
18   augment the record concerning the fraud.   The only  
19   cost is a little more delay, but they were prepared  
20   to do six months of some kind of discovery.   So  
21   we'll -- we can even do it quicker than that if  
22   your Honor wanted.   We would do depositions in 45  
23   days.   We can do depositions in 30 days.

24          THE COURT:   I don't know, is that  
25   realistic for you, Mr. Boland?



1 MR. BOLAND: I don't think so, your Honor.  
2 And I think that this fairness that Mr. Snyder  
3 keeps talking about, it eludes him that this case  
4 -- and the Court has been eminently fair to the  
5 defendants and to the plaintiffs in what was agreed  
6 to by Mr. Lake prior to us coming on the case.

7 There is no unfairness to them having agreed to  
8 have given us their expert reports, and now we get  
9 to depose their experts. They want to dismiss my  
10 client's entire claim with no fact discovery. It's  
11 hardly unfair to let us depose their experts, and  
12 after that deposition when they see all the holes  
13 in their expert's analysis, and approaches, and  
14 whether they're even valid experts and Daubert  
15 qualified, they can respond with whatever they  
16 think is appropriate that they need another  
17 opportunity to supplement the report to sort of  
18 rehabilitate them, let them do that. That's fine.

19 But to say it's unfair that they've had  
20 one-sided discovery, they've had all the fact  
21 evidence, and now they also get to see our expert  
22 reports, which we can't complete until we hear what  
23 the basis is for some of the conclusions in these  
24 expert reports, which, frankly, our experts can't  
25 even anticipate, because some of them are so

1 outside the field of what those experts do, they  
2 have no idea the basis of some of those conclusions  
3 in there, because no other expert in their field  
4 has come up with those kinds of conclusions. It's  
5 just -- it's not doable for them. They're going to  
6 say I don't know what to put in this report to  
7 approach that, because I don't know what his data  
8 is that backs up the facts.

9 MR. SNYDER: Your Honor, there's not been  
10 one-sided discovery. Their experts and the  
11 plaintiff had access to the same Work for Hire  
12 document StreetFax contract and backdated and other  
13 manipulated files that our experts have had.  
14 They've had it for a longer period of time than  
15 we've had. And if they were content to have six  
16 months of discovery, all we're proposing is take  
17 that six months and conform it to your Honor's  
18 discovery protocols, as opposed to the discovery  
19 protocol they wanted. And if -- and if Mr. Boland  
20 is comfortable doing it faster, we'll do it as fast  
21 as he wants. As fast as he wants, we can do it.

22 MR. SOUTHWELL: Your Honor, if I could  
23 just add one point on this. You're talking about  
24 not having access to what the results of the tests  
25 are. Exhibit L to Mr. LaPorte's test is the

1 comparison of the concentrated 2PE results. This  
2 is the data that he relies on that Mr. Boland is  
3 somehow claiming we don't know until we depose him.  
4 Of it's right there in the report. It's all  
5 spelled out in the report.

6 MR. BOLAND: That's a cherry picked one  
7 page. It's not spelled out. The PE test to begin  
8 with has absolutely no data underlying its entire  
9 science.

10 MR. SNYDER: There is no reason to suspend  
11 the Federal Rules of Civil Procedure governing  
12 expert discovery if your Honor is ordering expert  
13 discovery. The rules are well considered.  
14 Congress promulgated that rule after many smart men  
15 and women gave commentary about how expert  
16 discovery should proceed. And to -- to sidestep  
17 that established, well-recognized, and fair,  
18 reasonable procedure of either simultaneous  
19 exchange or sequential exchange in advance of  
20 depositions, again, makes no sense given that it is  
21 the plaintiff here to is perpetuating the fraud and  
22 comes to this court with unclean hands, given all  
23 the evidence of his own misconduct.

24 And so I think that what we're asking for is --  
25 is appropriate, reasonable, and in accordance with

1 standard operating procedure. And to allow him to  
2 take depositions of experts while concealing from  
3 us what his expert opinions are is -- there's no  
4 good reason for that whatsoever. And again, we are  
5 prepared to go as fast as Mr. Boland wants, if he's  
6 concerned about delay, as the plaintiff.

7 MR. BOLAND: It's not argument about  
8 delay. It's about fairness.

9 THE COURT: Well, I'm just trying to  
10 reacquaint myself, Mr. Southwell, with the sequence  
11 for deposition of experts, says if Rule 26(a)(2)(B)  
12 requires a report from the expert, the deposition  
13 may be conducted only after the report is provided.  
14 (a)(2)(B), unless otherwise stipulated or ordered,  
15 this disclosure must be accompanied by a written  
16 report. Unless otherwise stipulated or ordered by  
17 the court. So it's not ironclad, Mr. Snyder.

18 MR. BOLAND: It's not an abuse of  
19 discretion either.

20 MR. SNYDER: Well, what's ironclad is  
21 the -- as I recall from the advisory committee  
22 notes is the purpose of that is to -- and behind  
23 the new expert discovery rules -- they're not so  
24 new anymore -- is to avoid surprise, and to provide  
25 as much information to each party so that experts

1 can make informed deposition testimony, and to be  
2 efficient, because otherwise you would do a  
3 piecemeal --

4 THE COURT: Well, I can --

5 MR. SNYDER: -- game of gotcha, game of  
6 surprise.

7 THE COURT: I mean, what I'm -- what I'm  
8 concerned about is we're going to have this  
9 elongated process where there's going to be  
10 rebuttal report, then there's going to be a  
11 surrebuttal report based on deposing their experts.  
12 It's going to go back and forth, back and forth.

13 MR. SNYDER: No, your Honor, it won't be.  
14 No. No, no. No. There will be a period, they'll  
15 give us the report. We will have expert  
16 depositions. They'll file their opposition brief  
17 and attach whatever they want to attach to it. We  
18 will file our reply brief and attach whatever we  
19 want to attach to it. Whether it's another report,  
20 whether it's a deposition testimony. We would be  
21 doing that in any event, that is filing an  
22 opposition brief or reply brief --

23 THE COURT: No, my point is we're going to  
24 get a report from them, then there's going to be a  
25 deposition of your experts.

1 MR. SNYDER: Yes.

2 THE COURT: Then there's going to be  
3 another report.

4 MR. SNYDER: Maybe not.

5 MR. BOLAND: Absolutely.

6 MR. SNYDER: No, your Honor. My hope  
7 would be -- my hope to, your Honor --

8 THE COURT: Yeah.

9 MR. SNYDER: -- is that my expert  
10 witnesses, all of them, will address on the record  
11 everything they need to address when confronted  
12 with the report that their expert has.

13 THE COURT: In their opposition papers, I  
14 see.

15 MR. SNYDER: And if in our opposition  
16 papers we need to submit an affidavit saying Romano  
17 from RIT wants to address these three issues,  
18 here's a two-page affidavit. It's efficient. And  
19 giving the Court the best information.

20 THE COURT: It's going to take a lot of  
21 time.

22 MR. BOLAND: It's efficient with no  
23 cross-examination to an affidavit either. So how's  
24 that -- that's strike on fairness.

25 THE COURT: Well, we've got to move

1 forward here. So we'll give you two months to file  
2 your expert reports that you intend to rely on in  
3 opposing the plaintiff's -- the defendant's motion  
4 to dismiss. And we will give you two months within  
5 which to schedule depositions and conduct  
6 depositions of the defendant's experts, that is to  
7 say, those who have filed reports in defendants'  
8 motion to dismiss.

9 We will then give you two additional months  
10 Mr. Snyder, in which to file the plaintiff's  
11 opposition to the motion to dismiss, correct?

12 MR. SNYDER: Well, two months for  
13 Mr. Boland.

14 THE COURT: Yes.

15 MR. SNYDER: The one question I had, your  
16 Honor, where do --

17 THE COURT: That's what I'm trying to get  
18 to here.

19 MR. SNYDER: What I thought --

20 THE COURT: What I'm not still clear about  
21 is, do you need to depose them --

22 MR. SNYDER: Yes.

23 THE COURT: -- before --

24 MR. SNYDER: Yes.

25 THE COURT: -- the plaintiff's opposition

1 papers are filed?

2 MR. SNYDER: Yes. I think that all the  
3 deposition, expert deposition should be closed  
4 within two months. We can do them all in two  
5 months. And then they file their opposition, and  
6 we file our reply.

7 THE COURT: All right. So here we go.  
8 The plaintiff's expert will file their reports  
9 opposing -- in opposition to the defendants' motion  
10 to dismiss, and then within the following two-month  
11 period both parties may depose each other's  
12 experts.

13 MR. SNYDER: Yes, your Honor.

14 THE COURT: Mr. Boland?

15 MR. BOLAND: Yes, your Honor. Sixty days  
16 is fine.

17 THE COURT: All right. And then following  
18 the close of expert depositions, the plaintiff  
19 shall file its opposition to defendants' motion to  
20 dismiss. And then within 30 days the defendant may  
21 file its reply.

22 MR. DUMAIN: Your Honor --

23 THE COURT: Two months. Two months after  
24 the close of expert depositions the plaintiff shall  
25 file his opposition to defendants' motion to



1 dismiss. Defendant shall file a reply within 30  
2 days thereafter.

3 MR. SNYDER: That's fine, your Honor.

4 THE COURT: Oral argument at the Court's  
5 discretion.

6 MR. DUMAIN: I just have one question,  
7 your Honor. I don't at all question your Honor's  
8 right to change your mind, but is that what just  
9 happened? Because everything you said before that  
10 seemed to indicate that you would allow us to take  
11 the depositions of their experts before --

12 THE COURT: I changed my mind.

13 MR. DUMAIN: Okay.

14 THE COURT: I'm trying to keep this as --  
15 what's the word I'm looking for? Non-controversial  
16 as possible. And I'm concerned that if I do what I  
17 thought made sense in terms of a timetable, that I  
18 might get some sort of an appeal, and then I got a  
19 district judge turning me around, and I've got to  
20 do this all over again. So I'm just a little  
21 sensitive about that. And I want to make sure that  
22 this thing goes along reasonably fairly and  
23 smoothly, even though it's going to take a little  
24 more time than I perhaps would prefer.

25 MR. DUMAIN: I understand that, your

1 Honor. But everything else that has happened up to  
2 this point has been out of the ordinary. And so,  
3 to suddenly -- when they produce their expert  
4 reports first, and when they had all the discovery  
5 they wanted, and we had no discovery of things that  
6 we say we need to respond to the motion to dismiss,  
7 to suddenly say, well, we're going to turn it into  
8 an ordinary schedule, I do think is unfair, your  
9 Honor, but I understand your Honor's point.

10 THE COURT: Well, I think it's not ideal,  
11 and I'm just trying to avoid unnecessary issues,  
12 shall we say. And he's quite right that the  
13 general practice as you all well know is that those  
14 expert reports get filed. If he's concerned about  
15 some sort of the, you know, surprise, I just don't  
16 want to have that issue creep into this litigation  
17 at this time.

18 MR. DUMAIN: The general practice --

19 THE COURT: I don't see any prejudice to  
20 your side to require your experts to file some  
21 reports at this point.

22 MR. DUMAIN: May I ask two other brief  
23 questions, your Honor?

24 THE COURT: Sure.

25 MR. DUMAIN: Do you also contemplate, your

1 Honor, the exchange of document discovery that  
2 typically is done with expert discovery, like the  
3 documents that they based their opinions on?  
4 Because deviating from that --

5 THE COURT: That's already been revealed.

6 MR. DUMAIN: Well, if it has, they'll have  
7 nothing more to produce.

8 THE COURT: What's that?

9 MR. DUMAIN: If it has, they'll have  
10 nothing more to production. But certainly expert  
11 depositions without the normal expert written  
12 discovery under Rule 26 deviates from the norm,  
13 your Honor.

14 MR. SNYDER: Everything they relied on we  
15 got from their computers and --

16 THE COURT: I thought it was fairly well  
17 understood that what the basis of the defendants'  
18 experts opinions were. Basically it is what it is  
19 as stated in this record, pretty definitively and  
20 under oath. Don't you think?

21 MR. DUMAIN: I think then they'll have  
22 nothing else to produce.

23 THE COURT: Well, you want sort of like a  
24 safety mechanism here just in case there was  
25 something that they relied on that they didn't

1       reveal?

2               MR. DUMAIN: Well, as we're discussing it,  
3       why don't we deal with that if something comes up  
4       in the deposition, we'll deal with it.

5               THE COURT: I was going to say that seems  
6       to me -- again just in the interest of time,  
7       Mr. Dumain --

8               MR. DUMAIN: That's fair. The only  
9       request I wanted to make, your Honor, and I don't  
10      even if there's objection to it. From what I read  
11      in the press, I think Facebook has given the  
12      Harvard emails to the press. They haven't given  
13      them to us.

14              THE COURT: I meant to ask that. I'm  
15      getting a little off, mix and matching here. But I  
16      wanted to ask, and I know this is a little off the  
17      point about the schedule. Based on the  
18      supplemental declarations that I ordered pursuant  
19      to granting your motion -- your sixth motion  
20      perhaps for -- to compel, that it was my  
21      perception, perhaps erroneously, that the plaintiff  
22      was now in compliance with the August 18th order,  
23      thus triggering the obligation of the defendants to  
24      provide to the plaintiff the so-called Harvard  
25      emails that you've been carrying around in your

1 vest pocketing in a CD all these many months,  
2 Mr. Snyder.

3 MR. SNYDER: Right. Again, like the  
4 motion to dismiss, we had hoped to produce those  
5 emails in September and move to dismiss, and I  
6 think we're close.

7 THE COURT: What is that he owes you?

8 MR. SNYDER: There's one area where --  
9 and, again, often when there's obstruction or  
10 equivocation, there's something lurking that is  
11 important, if not dispositive, as in the case of  
12 the StreetFax contract. So the one -- one area is  
13 he's not complied with his duty to effectively  
14 facilitate the acquisition of a webmail account for  
15 the so-called Hush mail email account, which is a  
16 Canadian-based encrypted web provider, and --

17 THE COURT: Did I not address that?

18 MR. SNYDER: You did, but they have not --  
19 what they did in the past is kind of not fill out  
20 the forms correctly, give us incomplete  
21 information, and it has taken a while to acquire  
22 each webmail account. We still haven't acquired  
23 the Hush mail account yet. As soon as we do --

24 THE COURT: Well, is that because of any  
25 fault on his part not complying.

1 (Indiscernible cross-talk).

2 THE COURT: One at a time. One at a time.

3 MR. SOUTHWELL: Your Honor, this is -- we  
4 had some back and forth with Hush mail about the form  
5 of the consents that Mr. Ceglia filled out.

6 THE COURT: Yeah. Right.

7 MR. SOUTHWELL: And thanks, your Honor,  
8 for clarifying it. And so we're now waiting for  
9 the results of Hush mail based on Mr. Boland's last  
10 provision of the consent and whether Hush mail will  
11 accept that form. As soon as we know that they  
12 will accept it and we get the contents, we'll know  
13 that he has facilitated access.

14 THE COURT: But hasn't he done exactly  
15 what you told him to do?

16 MR. SNYDER: We don't know.

17 MR. SOUTHWELL: No. He did whatever --  
18 Hush mail is the one that decides what  
19 requirements --

20 THE COURT: Is this a moving target by the  
21 provider?

22 MR. SOUTHWELL: We have conveyed what Hush  
23 mail said. He has not done exactly what Hush mail  
24 asked for. He's explained to Hush mail why he  
25 didn't do that. It has to do with they requested

1       that Mr. Boland execute a declaration that  
2       Mr. Ceglia was declaring it in his presence. And  
3       Mr. Boland explained he wasn't able to do that. We  
4       have not yet heard. I've inquired of Hush mail as  
5       to whether this is acceptable. They have not told  
6       us whether it is acceptable yet. So we're almost  
7       there.

8               THE COURT: That was not part of the  
9       motion, that particular point.

10              MR. SOUTHWELL: Well, it was -- Mr. Ceglia  
11       has an obligation to facilitate access to --

12              THE COURT: No, but you specified exactly  
13       what it was that he had not done. I directed him  
14       to do it.

15              MR. SOUTHWELL: Right.

16              THE COURT: He did it.

17              MR. SOUTHWELL: That was to provide a  
18       consent. He provided a consent, but it was not  
19       sufficient.

20              THE COURT: Which we learned after the  
21       motion was filed.

22              MR. SOUTHWELL: Correct.

23              THE COURT: So we have a new issue.

24              MR. SOUTHWELL: And we're hoping that we  
25       can resolve it, and that we should know -- again,

1       that we should know. If Mr. Ceglia was here in the  
2       United States it would be easy for him to sign it  
3       in front of Mr. Boland and it would be a nonissue,  
4       but --

5               THE COURT: How about a video conference,  
6       would they accept that?

7               MR. SOUTHWELL: I was hoping, your Honor,  
8       that we could simply resolve it with Mr. Boland  
9       hopefully in the next few days.

10              THE COURT: But Mr. Ceglia is not -- he's  
11       not noncompliant with my order at this point, is  
12       he?

13              MR. SOUTHWELL: We don't know. We don't  
14       know because they have not said he's in compliance,  
15       and so we're waiting for that confirmation that  
16       he's compliant before we know that he's in  
17       compliance, and that he's do not what needs to do  
18       to facilitate access, which was what your Honor had  
19       required. We think we're very close, and as soon  
20       as that occurs, we'll --

21              THE COURT: Okay. So that's the answer,  
22       Mr. Dumain, I guess.

23              MR. BOLAND: Your Honor, can I correct the  
24       record, your Honor? Mr. Ceglia is completely in  
25       compliance. He got a consent form. He did



1 everything in his power and signed it, so did I,  
2 and we sent it to this Canadian company. It is not  
3 a feature of his noncompliance because a Canadian  
4 email company is not satisfied with everything that  
5 he can provide in that document. That's just not  
6 accurate. He's totally in compliant now, and if  
7 that company decides they don't like the form of  
8 information he provided, even though he provided  
9 everything they requested, that's not  
10 noncompliance.

11 THE COURT: But -- and you will cooperate  
12 in providing a new form.

13 MR. BOLAND: Absolutely.

14 THE COURT: Absolutely.

15 MR. BOLAND: Every form --

16 THE COURT: But you want the Harvard  
17 emails?

18 MR. BOLAND: Pardon me?

19 THE COURT: You'll want that CD that  
20 Mr. Snyder has got in his vest pocket.

21 MR. BOLAND: We don't want it. The Court  
22 ordered him to give it to us. So we want you --

23 THE COURT: You don't want it, I'm sure  
24 he'll be happy not to give it to you.

25 MR. BOLAND: They ordered to provide it,

1       that's what they're saying.

2               THE COURT: I know.

3               MR. BOLAND: It's a little bizarre they  
4       provide it to the press before us.

5               THE COURT: That I don't know about, and  
6       it would be surprised if that happened.

7               MR. SNYDER: Again --

8               MR. BOLAND: That's just par for the  
9       course.

10              MR. SNYDER: Mr. Boland asserts facts as  
11       an officer of this court without any good-faith  
12       basis to believe that. What he just told your  
13       Honor is a lie. It's not true.

14              THE COURT: He didn't say it. Mr. Dumain  
15       said it.

16              MR. SNYDER: Well --

17              MR. BOLAND: The press is saying they got  
18       they two emails from the defendants. Harvard  
19       emails got sent to them. So that's a good-faith  
20       basis. They relied on the press in their motion,  
21       so we can too.

22              MR. SNYDER: We attached emails to our  
23       motion to dismiss. Those are in the public record.  
24       And the press has read those emails that are in the  
25       public record, as anyone accessing the public

1 record can. So we did not give the press the CD  
2 that I've been holding since September to give to  
3 Mr. Lake had Mr. Ceglia not obstructed discovery.

4 THE COURT: All right.

5 MR. SNYDER: It's not true.

6 THE COURT: If I can cut the Gordian knot  
7 here, I find that the plaintiff is substantially in  
8 compliance with its obligation under the August  
9 18th order as regard these email accounts, and I  
10 direct that the defendants provide him with the  
11 reciprocal discovery to which they're entitled  
12 forthwith.

13 MR. SNYDER: Happy to do so.

14 MR. BOLAND: Very well.

15 THE COURT: What else, Mr. Dumain?

16 MR. DUMAIN: Nothing else. Thank you very  
17 much, your Honor.

18 MR. BOLAND: Nothing's else, your Honor.

19 THE COURT: All right. What about the  
20 motion to dismiss on statute of limitations  
21 grounds? What conceivable discovery do you need to  
22 fairly oppose that motion, Mr. Boland?

23 MR. BOLAND: Well, your Honor, there's a  
24 lot of factual issues that can relate to when the  
25 statute of limitations begins to run. Their bald

1       assertion is the moment Mr. Zuckerberg incorporated  
2       something --

3               THE COURT: Well, this is the time to be  
4       very specific, because if I don't hear something  
5       very specific in the next five minutes, I'm going  
6       to direct that you file an opposition to that  
7       motion within two months after the close of expert  
8       discovery.

9               MR. BOLAND: Well, your Honor, can we have  
10      a short period of time to respond to that question  
11      with regard -- in writing to the defendants, to the  
12      court with what fact discovery and what our basis  
13      is?

14              THE COURT: All right.

15              MR. BOLAND: Whatever the Court thinks is  
16      reasonable, because --

17              THE COURT: I'm not saying I'm going to  
18      give you any. All I said in December was that  
19      considerations of fairness, given the magnitude and  
20      complexity of the case sort of triggered in my mind  
21      a need to have expert discovery. I wouldn't even  
22      have to do that. You didn't like what you get, you  
23      can appeal to the district judge. But I've decided  
24      to go down that path because I'm now persuaded that  
25      you're still entitled to that, as I thought you

1 might be in December, notwithstanding the plethora  
2 of information and the appearance of competency of  
3 the defendants' experts.

4 But as to the statute of limitations issue and  
5 the laches issues -- by the way, they say that  
6 laches is inapplicable here because it's a money  
7 judgment request, Mr. Snyder. There was no mention  
8 of that in your reply. They say that laches is  
9 unavailable to you, because this is a money  
10 judgment request, and laches is only available in  
11 an equitable relief. You didn't address that in  
12 your reply. You want to address that in a  
13 supplemental reply?

14 MR. SNYDER: Yeah.

15 THE COURT: Okay. Fine, you do that, then  
16 I'll give them a chance to respond. But on the  
17 concept of -- obviously we don't need, I think,  
18 expert discovery or disclosures or anything else or  
19 opinions on whether or not there's a valid statute  
20 of limitations slash laches defense that requires  
21 dismissal, I'm wanting to hear from you why you  
22 need any fact discovery beyond what's already in  
23 this record on these motions. That's also  
24 available to you to fairly oppose that motion.

25 MR. BOLAND: Yes, your Honor. That's what

1 I was requesting before. I wasn't clear.

2 THE COURT: And you feel like you need  
3 additional time. It's late. We've been at it now  
4 for quite a long time. And you'd like an  
5 opportunity to further brief have that?

6 MR. BOLAND: Yes, your Honor, a brief that  
7 lays out why we feel we need factual discovery on  
8 those legal issues.

9 THE COURT: What fact discovery you need  
10 specifically.

11 MR. BOLAND: And what fact discovery we  
12 believe we need we'll tie it in to the issues.

13 THE COURT: Okay.

14 MR. BOLAND: And I think that's  
15 reasonable.

16 THE COURT: You can provide that within  
17 what time?

18 MR. BOLAND: Seven days, your Honor.

19 THE COURT: Seven days?

20 MR. SNYDER: May I address that form a  
21 minute, your Honor? Because we've been subjected,  
22 as your Honor knows from the one sanctions motion  
23 that was granted to an inordinate amount of  
24 litigation as a result of this fraudulent act of  
25 filing the lawsuit.

1           We respectfully submit that under Rule 12(c) the  
2           proper procedure is for -- instead of having more  
3           multiple layers of briefing upon briefing, is for  
4           this plaintiff to file in the ordinary course an  
5           opposition to our motion under Rule 12(c). If in  
6           that opposition, which is addressed to the face of  
7           the pleading he thinks he needs discovery, I don't  
8           even know -- I guess that argument is --

9           THE COURT: I guess technically that you  
10          refresh me that it's 12(c) there really wouldn't be  
11          any discovery.

12          MR. SNYDER: No, your Honor. So our  
13          position is that if the Court believes that on the  
14          face of the pleading and facts in the public record  
15          or facts as to which the Court permissibly can take  
16          judicial notice, there is an insufficient basis in  
17          law to dismiss on the pleadings, your Honor will  
18          deny that motion, and we'll either -- and that will  
19          be the end of it. But to have briefing on why  
20          there should be discovery under Rule 12(c) we think  
21          is inept.

22          THE COURT: Doesn't he have a point there,  
23          Mr. Boland, now that we've focused on it a little  
24          more clearly?

25          MR. BOLAND: Your Honor, we've addressed

1       this in our brief that -- that the statute of  
2       limitations on Mr. Ceglia's claim is triggered  
3       based on facts that aren't addressed in the  
4       pleadings. We don't have --

5               THE COURT: Well, that's the argument  
6       you'll make in opposition, and if we agree with  
7       you, we'll deny the motion and we'll proceed on  
8       that claim.

9               MR. BOLAND: But there are discovery  
10      issues which -- there's some -- we'd like at least  
11      the opportunity to argue that there's discovery we  
12      need to address that issue. And seven days seems  
13      reasonable, your Honor, to just brief that.

14              THE COURT: Yeah.

15              MR. SNYDER: Your Honor, that's their  
16      opposition brief, and it's not an appropriate  
17      argument to make under Rule 12, because the  
18      argument is --

19              THE COURT: Look, let's do this. It's  
20      already ten to five. We've really devoted a lot of  
21      energy to this, and I compliment both sides for  
22      their patience and their advocacy. Very helpful.  
23      Let's just do that. We'll give you seven days to  
24      tell me why you think you're entitled to discovery  
25      to oppose that motion.



1 MR. BOLAND: Yes, your Honor. Very well.

2 THE COURT: We'll give the defendants  
3 seven days, and one of the arguments first and  
4 foremost will be, Judge, it's irrelevant. It's a  
5 12(c) motion. Make the argument, I'll evaluate it,  
6 we'll make a ruling. If we're wrong, somebody will  
7 appeal, and that will be that. Otherwise, it will  
8 go away as an issue. And then at that point we'll  
9 direct -- if we don't permit discovery on that  
10 motion, then we will probably direct that your  
11 formal response to it be filed at the same time as  
12 your motion to -- your opposition to the motion to  
13 dismiss.

14 MR. BOLAND: Very well.

15 THE COURT: Would that be reasonable?

16 MR. BOLAND: Yes, your Honor.

17 MR. SNYDER: May I just say, your Honor,  
18 for the record that every time that the plaintiff  
19 seeks to impose additional costs and burden and  
20 prevails upon your Honor to grant them that relief,  
21 it's of vexatious multiplication of litigation for  
22 which we, at the end of this case intend to hold  
23 the plaintiff and all counsel fully responsible. I  
24 just wanted to say that in connection with this,  
25 which is, again, an exemplification of their

1 strategy here. Cause Facebook and the defendants  
2 to spend more time and more money --

3 THE COURT: You can attempt to hold  
4 anybody responsible for the cost of litigation that  
5 you'd like, just don't include me.

6 MR. SNYDER: No, your Honor. Thank you.

7 THE COURT: Anything further on behalf of  
8 the plaintiff?

9 MR. BOLAND: No, your Honor. Thank you.

10 THE COURT: Defendant.

11 MR. SNYDER: Thank you, your Honor.

12 THE COURT: We are adjourned. Have a safe  
13 trip back everyone that's traveling.

14 MR. DUMAIN: Thank you.

15 \* \* \* \* \*

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

I certify that the foregoing is a  
correct transcription, to the best of my  
ability, from the electronic sound recording  
of the proceedings in this matter.

s/Michelle L. McLaughlin  
Michelle L. McLaughlin, RPR  
Official Reporter  
U.S.D.C., W.D.N.Y.